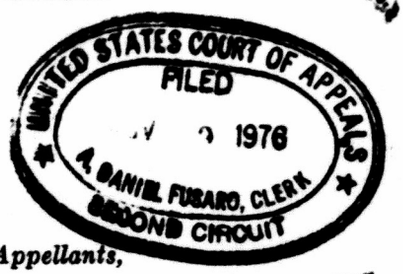
United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7454-7480



United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,

and

MORRIS LEVY,
Additional Defendant on Counterclaim-Appellant.

B 8/5

JOINT APPENDIX
VOLUME V—Pages 2563 to 3452-C

NEMEROFF, JELLINE, DANZIG, PALEY, MANDEL AND BLOCH
Attorneys for Additional Defendant on Counterclaim-Appellant Morris Levy
350 Fifth Avenue
New York, New York 10001
(212) 947-6760

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs-Appellants Big Seven Music Corp. and Adam VIII, Ltd.
280 Park Avenue
New York, New York 10017
(212) 682-2323

MARSHALL BRATTER GREENE ALLISON & TUCKER, Esqs.
Attorneys for Defendants-Appellees John Lennon and Harold Seider
430 Park Avenue
New York, New York 10022
(212) 421-7200

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Defendant-Appellee Apple Records, Inc.
One State Street Plaza
New York, New York 10004
(212) 344-0600

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

PAGINATION AS IN ORIGINAL COPY

INDEX

PAGE

Relevant Docket Entries 1a

Amended Complaint 9a

Exhibit A, Transcript of October 12, 1973 Hearing 26a

Exhibit B, Letter dated October 30, 1973 ..... 31a

Exhibit C, Letter December 31, 1974 ..... 33a

Exhibit D, Letter January 9, 1975 ..... 34a

Exhibit E, Telegram 35a

Exhibit F, Plaintiff's Telegram 36a

Exhibit G, Reply Telegram 37a

Exhibit H, Telegram February 10, 1975 ..... 38a

Exhibit I, Seider's Telegram 39a

Second Amended Answer and Counterclaims of Defendant EMI 40a

Second Amended Answer and Counterclaims of Defendant Capitol 61a

Answer to Amended Complaint and Counterclaim of Defendant Apple 80a-2

Additional Defendant Levy's Answer to Counterclaims of Defendant EMI 93a

Plaintiffs' Reply to Counterclaims of Defendant EMI 99a

Plaintiffs' Reply to Counterclaims of Defendant Capitol 104a

Additional Defendant Levy's Answer to Counterclaims of Defendant Capitol 109a

Defendant Seider's Amended Answer to Amended Complaint of Plaintiffs 114a

INDEX

PAGE

Defendant Lennon's Amended Answer to Plaintiffs' Amended Complaint & Counterclaim 121a

Additional Defendant Levy's Answer to Counterclaim of Defendant Apple 134a

Plaintiffs' Reply to Counterclaim of Defendant Apple 138a

Defendant on Counterclaim Levy's Answer to Counterclaims of Defendant Lennon 142a

Plaintiffs' Reply to Counterclaims of Defendant Lennon 147a

Opinion #43919 (February 20, 1976) 152a

Opinion #44746 (July 13, 1976) 181a

Notice of Motion for an Order Pursuant to Rule 52(b) and 59(A) FRCP Vacating or Modifying This Courts Finding and Conclusions. 207a

Affidavit of Alan Kanzer in Support of Motion. 209a

Exhibits Annexed To Foregoing Affidavit Exhibit A. 225a

Exhibit B, Letter May 1974. . . . . 234a

Exhibit C, Affidavit of Harvey Zucker. 241a

Exhibit D, Affidavit of Abraham I. Massler. 246a

Exhibit E, Affidavit of Charles J. Sutton. 250a

Affidavit of Howard R. Roy in Opposition to Motion to Amend Findings or for a New Trial. 252a

INDEX

Judgment #76,761 ..... 258a

Notice of Appeal by Big Seven, Adam VIII and Levy 263a

Cross Notice of Appeal 265a

Affidavit of James M. Bergen in Support of Motion for Leave to File a Late Cross Notice of Appeal 267a

TRIAL TRANSCRIPT

Phase 1 1-2344

February 27, 1976 Hearing 2344a1-2344a78

Phase 2 2345-3348
3368-3457

Findings and Conclusions on Phase 2 3458-3485
3828-3862

Phase 3 3349-3367
3486-3827
3863-4158
4159-4193

Motion to Amend and for New Trial 4194-4337

Motion for Leave to File Cross Appeal 4338-4344

INDEX

EXHIBIT VOLUME

EXHIBITS

Plaintiffs Exhibits

PX

4B - Billboard, November 9, 1968, Article: Cosby's Co. Faces the N[illegible]d Truth - Bows Nude LP in [illegible].S. ..... (E) 1

4J - Rolling Stone, March 1, 1969 Article: "Genitalia Slips Quietly Under the Counter". 2

10 - Playboy November 1971 Article "Playboy Interview: Allen Klein" 3

11 - October 12, 1973 Settlement Transcript Big Seven v. Maclen Music Inc., et al. 13

12 - October 30, 1973, Michael Graham Letter to Lennon Countersigned by Lennon 19

20 - September 6, 1974 Krasilovsky Letter to Feigenbaum 21

22 - October 4, 1974 Krasilovsky Letter to Feigenbaum 22

23 - Songs Given to John Lennon 23

24 - John Lennon Typed and Handwritten List of Songs 26

28 - December 11, 1974 Assignment From Big Seven ti Adam VIII 27

28a - Schedule A Attached to Assignment 28

30 - December 31, 1974 Dolgenos Letter to Big Seven 29

31 - January 9, 1975 Levy Response to Dolgenos 30

41a -Capitol Telegram 31

41B- Capitol Telegram 32

41C- Capitol Telegram 33

INDEX

EXHIBIT VOLUME

EXHIBITS

Plaintiffs, Exhibits

PX		(E)
41D	- Capitol Telegram	34
41E	- Capitol Telegram	35
41F	- Capitol Telegram	36
41G	- Capitol Telegram	37
41H	- Capitol Telegram	38
41I	- Capitol Telegram	39
41J	- Capitol Telegram	40
41K	- Capitol Telegram	41
41L	- Capitol Telegram	42
41M	- Capitol Telegram	43
41N	- Capitol Telegram	44
41O	- Capitol Telegram	45
41P	- Capitol Telegram	46
49	- February 11, 1975, "Trade Release"	47
65	- Viva March 1975 Article: "John Lennon Talks About Music, Money, Marriage and Fame	50
80	- List of Adam VIII 7½ Inch Master Tapes Submitted From Various Record Companies	56
81	- List of Adam VIII Packages	58
84	- Beatles Settlement Agreement, December 29, 1974	60
85	- Bernard Brown Statement, April 4, 1975	90
98	- Master License dated April 9, 1973	91
99	- Seider's Copy of Levy's January 9, 1975 Letter to Dolgrnos	97
100	- Chapman's Trial Testimony During the MacMahon Trial	98
101	- Official Airlines Guide, October 1, 1974	106a
102	- Defendants' Exceptions to Plaintiffs' Statement of Facts and Defendants' Amended Joint Statement of Facts	107
105	- Albert E. Coury's Deposition	148
110	- John Lennon's Sales History	153
200	- Village Voice, March 10, 1975 Article: "John Lennon: Sad Movies Make Me Cry"	154
201	- Rolling Stone, May 2, 1975 Article: "Lennon Gets Lost in His Rock and Roll"	155

INDEX

EXHIBIT VOLUME

EXHIBITS

Plaintiffs, Exhibits

PX		(E)
201A	- Song Sheet for "Oye Como Va"	156
201B	- Planetary Music Mechanical and Performance Income from "Oye Como Va"	159
202	- NOM Music Inc. - Mechanical and Performance Income From "Daddy's Home"	160
202A	- Song Sheet for "Daddy's Home"	161
203	- Mechanical and Performance Income From "Maybe"	164
203A	- Song Sheet for "Maybe"	166
204	- Mechanical and Performance Income for "My Boy Lollipop"	169
204A	- Song Sheet for "My Boy Lollipop"	171
205	- "Big Seven Music and Affiliates" Summary and Projection of Earnings	173
225	- N.Y. Times Magazine Ad, March 28, 1976: Paul McCartney "Wings"	174
226	- N.Y. Times Ad, October 6, 1974: "Walls & Bridges"	175
231	- Billboard Chart, March 15, 1975	176
232	- "Rock 'n Roll" Weekly Sales and Returns	178
233	- John Lennon Releases: First 13 Weeks	179
236	- Front Page re: Official Budget Projections	180
237	- Memo to Menon, Dated february 7, 1975	182
241	- Posner's Common Expenses Deducted From Gross Income	183
241A	- Lennon Rock 'n Roll Album Projected per Unit Profitability Through 2/76	184
250A	- Billboard Chart Summary for "Rock 'n Roll"	185
250B	- Cashbox Chart Summary for "Rock 'n Roll"	186
250C	- Record World Summary for "Rock 'n Roll"	187
250D	- Comparision of "Rock 'n Roll" Chart Position in Billboard, Cashbox and Record World	188
251	- Cashbox , February 22, 1975	189
252	- Record World, February 22, 1975: "Rock 'n Roll" Ad	190
253	- High Fidelity Magazine, June 1975 Article: "John Lennon: Rock 'n Roll"	191
701	- Domestic Mechanical Royalties Due From John Lennon Recordings re: 1973 Copyright Infringement Settlement	192

INDEX

EXHIBIT VOLUME

EXHIBITS

Plaintiffs, Exhibits

PX		(E)
302	- Losses Due to Noncompliance With 1973 Copyright Infringement Settlement	193
302B	- Foreign Sales for "Walls & Bridges" (for identification)	194
303	- EMI's Interrogatory Answers Annotated re: Foreign Sales for "Rock 'n Roll"	195
303A	- (Revised), Loss of Foreign Mechanical Income - Exclusion of One Song on "Rock 'n Roll"	196
340	- Dave Marsh Letter to Bergen (Unaudited)	197
375	- Big Seven Average License Fees Paid by Affiliates	200
451	- Earnings for "Close to You" by The Carpenters	201

Defendant's, Exhibits

DX		
B-1	- 1967 EMI/Beatles Agreement	207
C-2	- Capitol/Apple Agreement	223
D	- EMI/Apple 1969 Agreement	272
Q	- Brescio Mastering Notes	281
AG	- Letter From Bill Dietz Assoc.	282
AN	- Jurgen Vollmer Letter 1/31/75	284
AR	- Plaintiffs' Bill of Particulars (Composite of Demand and Response)	285
AS-1	- Apple's First Set of Interrogatories	293
AU	- Plaintiffs' Answers to Apple's Second Set of Interrogatories	303
AV	- Levy Affidavit for General Preference, August 7, 1975	308
BQ-1	- Calbi Mastering Tape Side 1	312
BQ-2	- Calbi Mastering Tape Side 2	314
BS	- Capitol Permission (Release) on "Two Virgins"	316
CA	- Diagram Drawn by Brown on Witness Stand	318
CE	- Resoulution Concerning Licensing of Non-Beatle Masters	319
CG	- Big Seven Trial Balance 6/30/76	321
CH	- Dinner Bill for Cicalas & Lennon and Pang 12/3/74	325

INDEX

EXHIBIT VOLUME

EXHIBITS

Defendant's Exhibits

DX		(E)
CK	- EMI Letter to "Two Virgins" (Release)	327
CL	- Adam VIII Retail Fulfillment Sales Analysis	329
CO	- State Court Complaint (without Exhibit)	332
CP-1	- Capitol Records Contracts 11/3/71	347
CP-2	- Capitol Records Contracts 8/29/68	352
CP-3	- Capitol Records Contracts 9/25/67	357
CQ	- Plaintiffs' Statement of Disputed and Undisputed Facts	362
CR	- Federal Complaint (Without Exhibits)	377
CR-1	- Capitol Industries Corp. Relation Chart	388
CT	- History Prepared by Vaughn Burdick (Schedule of Charges on "Rock 'n Roll"	389
CU	- Report of Capitol Marketing Re: T.V. Commercials	390
CV	- Report of Number of Homes Watching at date of Advertisement	395
CW	- Capitol Marketing Plan - "Rock 'n Roll" 2/11/75	396
CX	- Capitol List re: Promotional Campaign for "Rock 'n Roll" 3/25/76	397
CY	- Handwritten Notes by Kohara From February, 1975	399
DB	- 3/24/75 - Posner Memo re: Price of Capitol Albums	401
DC	- 10 Methods Used to Project "Rock 'n Roll" Unit Sales	402
DD	- Lennon U.S. Unit Sales History	403
DE	- Projection for Fiscal 1975 (U.S. Budget) 2/28/74	404
DF	- Canada's Share of U.S. Unit Sales of All Lennon Albums	406
DG	- Canada's Share of U.S. Unit Sales on 2 Prior Lennon Albums	407
DH	- Canada's Share of U.S. Unit Sales of All New Albums Released in February, 1975 to Compare With "Rock 'n Roll"	408
DI	- December 1974/April 1975 New Release Without Lennon	409
DJ	- 3/25/76 Posner to Burkhalter	411
DL	- Estimated Damages From "Roots" Album	413
DM	- Estimated Damages From "Roots" EMI Pressing Fees	415
DO	- Reviews of "Rock 'n Roll"	417
DR	- "YaYa" Song Sheet	421
DS	- "You Can't Catch Me" Song Sheet	425
DT	- "Angel Baby" Song Sheet	428
DU	- Big Seven - 75% Discount Performance Royalty	430

INDEX

EXHIBIT VOLUME

EXHIBITS

Defendant's Exhibits

DX		(E)
DW	- Domestic Performance Income for "Ya Ya","Angel Baby" and "You Can't Catch Me"	432
DX	- Strauss Schedule With Respect to Plaintiffs' 301	434
DX-1	- Strauss Schedule Relating to Plaintiffs' 301	436
DZ	- Schedule of Total Mechanical Income From "You Can't Catch Me"	438
EA	- Capital Canadian Sales Figures	439
EB	- Capitol License	440
EC	- Capitol License	441
ED	- Capitol License	442
EF	- Capitol License	443
EK	- Strauss Schedule re: "You Can't Catch Me","Angel Baby" and "YaYa"	444
EL-1	- Sleeve for Album	447
EN	- "My Boy Lollipop" - Analysis of Earnings by Artist ...	448
EO	- "Daddy's Home"- Analysis of Earnings by Artist	453
EP	- "Maybe" - Analysis of Earnings by Artist	462
EQ	- "Oye Como Va" - Analysis of Earnings by Artist	472
TTT	- Record Plant Document Re: Cutting Room Work on February 4 and 5 - Lacquer Master Cut 2/6	478
YYY	- Telegram Lennon/Capitol 1/31/75	484
CCCC	- Telegram Lennon/Levy	485
DDDD	- Telegram - Levy to Lennon/Seider 2/11/75	488
EEEE	- Telegram Seider to Levy 2/12/75	489
GGGG	- Graham Notes on Levy Meeting	491
HHHH	- Amex Co. for Behihana	492
OOOO	- Gortikov Memo	493

MR. PRETTYMAN: Your Honor, would you hear me for just a moment? It is so important that I hope you would give me just one more moment to try and persuade you.

First of all, it is my impression, and I would have to submit something to you in law on this, but it is my impression that the mitigation applies only to contractual rights and not to tort, but I can't say that definitively.

THE COURT: I don't think so at all.

MR. PRETTYMAN: I would remind you, sir, that the so-called mitigation period that we are talking about here ran only from January 30, when we found out about this thing, until February 6th, when we suddenly found the thing on the air.

It seems to me that unlike the TRO situation that you discussed, where usually those -- the facts are fairly clear, we have here a situation that would have been strongly contested on the facts -- we spent some 12 days in here trying to sort out the different views of the facts of what had happened -- I think just on its face it is clear that in this difficult a situation to have expected us to run into court, I think not only is expecting too much of us at a matter of law, but with all respect, I think it would have been totally irresponsible of Capitol and EMI to participate in anything like that.

We are told that a Mr. Levy is putting out an album that he claims he has a contract with Mr. Lennon to put out, and we are sitting there saying, you know, what is this? Don't we have a duty, instead of just rushing into court, to try and find out what happened and what was said and to get to the parties and discuss the possibilities that are open?

In other words, I think that that period in there, as recited by Mr. Menon this morning, really kind of speaks for itself and shows a great deal of responsibility on our prt in a very short time.

THE COURT: But you ended up on February 7 sending out telegrams?

MR. PRETTYMAN: After we had heard that it was already on the air.

THE COURT: I have a pretty strong feeling that this was a deliberate strategy decision, and you are entitled to make your strategy decisions, but the strategy decision you made had some problems to it. Any course of action had some problems, but the strategy decision you made meant that you would not know -- you would not really know the results of your telegrams -- in other words, you were forced, once you made the decision, to go the telegram route, you were really forced to rush this in production.

I would concede that in a minute, because you couldn't really count on this informal means, on what it would do. You were sending the telegrams out. You would hope for the best. But whether they would honor that you would not know. In the meantime, stuff is on television. Capitol has got to get its album out. Once that decision was made I think everything else follows, and you wouldn't wait to see the results.

You couldn't wait to see whether it was over on the 13th or the 16th or what, because that's too late. But if -- after Thursday the 30th, when you heard about this intention, there are -- that's what a TRO is for, and that is a situation where people only have a couple of days to come in in an emergency and their rights are being infringed, and -- I'm very reluctant to second guess anybody, because I wasn't there, but I'm suggesting that, in my mind there is a very serious issue about whether there couldn't have been a temporary restraining order presented to the court by Monday, after a good weekend's work, which lawyers are accustomed to doing, and that -- I frankly think the chances were way better than even that you could have -- that you could have done one of two things, gotten an agreement under the -- under sort of the informal aegis of the court for Levy to hold off and the facts would be explored, or,

can a Court even, over Levy's opposition, grant a temporary restraining order -- as far as the presentation of evidence, the parties have an absolute right to an evidentiary hearing on a preliminary injunction.

It isn't just a matter of what you can throw together in 24 hours. You have a right to present evidence and that, of course, if you could have done that, then -- and if you had succeeded, you would not have been in this awful position of not knowing what was going to happen, whether the TV was going to go on or wasn't. You would know it.

Even if you lost in the District Court, the Court of Appeals acts very fast on preliminary injunctions, and there wasn't -- Levy hadn't made any investment, and I think the chances are very, very good that the Court would have held the status quo at least until the facts had been explored.

MR. PRETTYMAN: Well, your Honor, I can only -- I guess I can only add that I really do in all honesty think that you are putting an unfair onus on us. I would remind you that Mr. Levy --

THE COURT: I'm just saying to you -- you say it is an important issue? I say it is. It is up -- you are perfectly welcome to explore all the considerations, but -- and have evidence on that, that's fine. I don't know what

went on. I don't know all your problems. I don't begin to know them. But it is an issue, and I think it is a legitimate issue.

MR. PRETTYMAN: You would just remind your Honor that it does seem to us that Mr. Levy had two very-- if you are talking about mitigation -- Mr. Levy had two very obvious opportunities here, which he let go by, when Mr. Seider told him he had no rights, he decided to go ahead, and when he received the telegram from Capitol informing him that we were asserting our rights and that we had the rights and that he didn't have the rights, he didn't choose to go in and get a temporary restraining order to stop us, he didn't choose to go into court, he went right ahead and put out his album.

Now, you are telling us that when we suddenly found out about this album coming out, not knowing the facts, trying to get everybody together, counsel in New York, counsel in California, that we suddenly had this obligation to rush into court really without understanding the situation, I can only say that I -- I guess I can only say that I disagree, but if your Honor is going to take that view I think we are forced to put --

4b am bsrf 1

MR. BERGEN: May I add one thing?

You are also asking us to mitigate damages in circumstances where a man sends a letter on January 9th saying he has world wide rights.

He alleges a claim on that. He puts that claim in an affidavit and in sworn answers to interrogatories and three weeks ago, right up in that courtroom he stood up there and said that wasn't true and he knew it wasn't true when he sent the letter. That is the type of person that we are supposed to mitigate damages against?

MR. SCHURTMAN: I object to that. That last statement is absolutely false.

THE COURT: What relevance has that?

MR. BERGEN: You are asking us to go into court half cocked and without the facts to stop him when he could have stopped -- as I said last night at 5:00 o'clock, he didn't have to put out this album.

THE COURT: Mr. Bergen, you are really off the issue completely.

I am talking -- when I talk about mitigation of damages, that comes in play after the wrongdoing has already been found. I assume that Mr. Levy acted in violation of everybody's rights in putting out that album, but certainly there is an initial issue of law as

bsrf 2

to the extent to which the duty to mitigate applies. I don't know, has anybody briefed that?

I deliver jury instructions all the time in tort cases about the duty to mitigate damages. Those happen to be negligence cases, the ones I am thinking of, and maybe as a matter of law there is no duty to mitigate where you have an intentional tort. I don't know.

I don't know of any -- I thought that the duty to mitigate damages was just so fixed in our law that I, frankly, didn't -- I haven't done independent research on this. Is anybody prepared to tell me that there is no duty to mitigate damages in this case?

MR. PRETTYMAN: The reason I am not prepared to address myself to it is that it never occurred to me for a moment that this brief period that we are talking about, where we were so busy, could possibly have been considered open to this question, so I am not prepared on it. I would be happy to look at it.

I would be --

THE COURT: Capitol had -- Capitol did take action; it sent those telegrams; it made a choice of its strategy.

MR. PRETTYMAN: After it was --

THE COURT: That is not significant. Capitol

bsrf 3

knew on the 30th of Levy's intentions, and what it learned on the 6th was just bearing out what it had learned before.

MR. PRETTYMAN: The impact of these TV spots is immediate, it is absolutely immediate.

THE COURT: No, no, I am talking about whether something should have been done before.

Look, if I am wrong as a matter of law, I'm wrong, but --

MR. PRETTYMAN: I guess the only choice we have is to put one of the participants on and to explain to you that we didn't make a deliberate choice, just, you know, not to sue in order not to --in order to let him go ahead and choose the other way, that there were problems.

I would just say to you, sir, that I think myself that the testimony so far speaks for itself as to the very responsible way in which we acted.

If Mr. --

MR. SCHURTMAN: Your Honor, may I ask you to clarify one point that you made?

THE COURT: What?

MR. SCHURTMAN: You said that you had evidently pretty much made up your mind that it wasn't

tsrf 4

necessary to return the album into production once they decided to follow the --

THE COURT: I just said that --

MR. SCHURTMAN: I'm prepared to argue and argue very forcibly that the one thing that they didn't have to do at that point was rush their album into production.

THE COURT: I'm focusing more on the other issue. Mr. Prettyman wants to know whether he should present evidence.

MR. SCHURTMAN: I hoep you have not made up --

THE COURT: Nobyd has briefed it, and I'm sitting here, using what occurs to me as, in my judgment -- I don't claim to have looked up the law on it, and I think that you better -- you can go on to something else and look up the law over the lunch hour and we can come back better informed.

MR. PRETTYMAN: Yes. I suggest we do that.

Mr. Zimmermann.

D O N Z I M M E R M A N N, called as a witness by Defendant Capitol Records, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Zimmermann, I hope you will keep your voice up --

THE COURT: I want to say, I don't mean to harp on this, but I think it is necessary for clarification, there may be an entirely different situation with respect to Capitol, and with respect to Seider and Lennon. In other words, the evidence now -- I hate to try to summarize evidence because, you know, there may be material lurking in the record that I don't recall, as there was yesterday afternoon, but anyway, my memory right now is that surely the -- Mr. Seider had the January 9th letter, and his -- and the Marshall, Bratter firm had the January 9th letter in the due course of mails.

The evidence of, I think, all sides is, at least the evidence of Mr. Menon, and I don't think it is contradicted, really, by anybody, is that Capitol was never informed of that letter, despite the fact that there were meetings in mid-January, and there was ample opportunity to disclose that letter to Capitol.

That may, if you are talking about things like attorney's fees or damages, there may be a distinction between the situation of Seider and Lennon and the

situation of Capitol.

So I think that you ought to -- everybody ought to think, help me keep in mind those distinguishing features and see if there are any particular issues of law relating to them.

Okay, go ahead.

BY MR. PRETTYMAN:

Q Where do you live, Mr. Zimmermann?

A In Los Angeles, California.

Q For whom do you work?

A Capitol Records, Inc.

Q What is your present title?

A I am executive vice-president and chief operating officer of Capitol Records, Inc.

Q What was your title back in February of last year?

A I was senior vice-president of marketing.

THE COURT: You are going to have to speak up.

THE COURT: Back in 1970 what?

THE WITNESS: '75.

THE COURT: What is your first name?

THE WITNESS: Don.

Q Would you tell us your experience in the music industry, please, sir?

A It goes back sometime -- I was pretty much raised in the business, my dad was in the retail trade. He had a music store.

Q Retail music store?

A Right. I started working full time in it in his store in 1958. In 1959 --

Q Had you worked part time in the store before that?

A Previous to that, yes. In 1959 I went to work for an independent distributor in San Francisco doing both sales and promotion. I joined Capitol Records in --

Q That was in connection with records and tapes?

A Yes. I joined Capitol Records in 1965 as a salesman. Subsequently I was district sales manager in Los Angeles, was a division manager in Chicago and New York.

Q A division manager in Chicago?

A And New York.

Q And New York?

A Yes.

I was national accounts manager for about a year. Became national sales manager and vice-president of sales, senior vice-president of marketing, and just recently my current position.

Q Would it be fair to say you have spent all of your adult life and part of your younger years in this business?

A Yes.

Q Would it also be fair to say that your experience has been wide-spread in the business, that is, that you have had something to do with most phases of the sales and distribution of records and tapes?

A Yes.

Q And in marketing particularly, how many years would you say you spent in the general area of marketing and marketing problems as it relates to records and tapes?

A About four years.

Q Did there come a time when a Mr. Posner, of Capitol -- perhaps you better identify him first.

A Yes. He is in the audience.

Q What was his --

A I'm sorry.

Q What was his title last year?

A He is in charge of our financial planning department.

MR. PRETTYMAN: Again, your Honor, I would remind everyone, so as to perhaps keep the questioning and cross examination down, this gentleman will present

lost sales impact, but that Mr. Posner will translate those first into actual dollar losses. That will not be in this gentleman's category.

THE COURT: All right.

Q Mr. Zimmermann, did there come a time when Mr. Posner came to you with a question in regard to a proposed album of rock and roll songs?

A Yes.

Q What was the question that he posed of you?

A It was based on a forecast of the album, with also the consideration of a possibility of a competitive package being offered on television.

Q Did he give you any details as to the competitor or the nature of the competition?

A Yes.

Q What was the particular information that he wanted to obtain from you?

A Well, in light of the rather unique circumstances, what impact on sales and what pricing strategies we must follow or should follow.

Q Specifically, were you asked whether a price of $5.98 would still allow the company to make a profit?

A Yes.

MR. SCHURTMAN: Can we fix a date for that

conversation, please.

Q Can you place the conversation as best you can?

A I don't have the exact date. But it was around the 1st of February, 1975, first week in February.

THE COURT: You say you were asked if $5.98 would still permit a profit?

THE WITNESS: Actually, Mr. Posner makes that determination.

THE COURT: I just was --

MR. PRETTYMAN: I phrased the question improperly. I'm sorry.

Q Did Mr. Posner tell you that he had been asked to do that?

A Yes.

Q And what were you asked to do to aid him in reaching that conclusion?

A To decide what would, in a competitive light, what would be necessary for us to be -- in a competitive situation at the consumer level -- we decided that a $5.98 price would be okay in that regard because records are pretty much discounted by retailers. We would make the effective price anywhere from $4 to $5.

We, of course, had no knowledge of what the

Adam VIII TV package would be offered at, but historically they are anywhere in that price range.

Q Would you explain to the Court what you mean, since Capitol is suggesting a price of $5.98, what it means that the retailer can discount that, is he free to make his own price?

A Absolutely.

Q What, in fact, normally happens in the marketplace in this regard?

A Generally, with new release items, even catalogers discount it to a degree. But new release items are discounted quite heavily and particularly new release items by an artist of the stature of Mr. Lennon.

THE COURT: I'm not hearing you. New release items are discounted what?

THE WITNESS: Discounted more substantially than a catalog item that has been available for some period of time. There is a great deal of excitement in the marketplace generated by the release of an artist of the stature of Mr. Lennon. Therefore, it becomes a very highly advertised item, under normal circumstances.

Q Is there more opportunity for the retailers to discount when the price is $5.98 than when it is $6.98?

A Yes. There is a greater margin.

THE COURT: I don't understand that. More opportunity to discount when the price is lower?

THE WITNESS: Because their net wholesale price is lower. It gives them an opportunity to sell the product at a lower retail price and maintain the same margin.

BY MR. PRETTYMAN:

Q Now --

THE COURT: There is something I don't understand. You are comparing what to what?

THE WITNESS: $5.98 to $6.98.

THE COURT: All right. Let's be specific. What would the wholesale price be on $5.98?

THE WITNESS: Around -- this is the only time we have released a $5.98 album, I don't recall the exact figure, but it is around $2.90.

THE COURT: What would it be for $6.98?

THE WITNESS: $3.36.

THE COURT: $2.90 for the $5.98 one and -- what is it?

THE WITNESS: $3.36 for the $6.98.

THE COURT: What does that lead to as far as discounting?

THE WITNESS: It varies, your Honor, with the

retail account or the racked outlet and will vary on a $6.98 album, which is most of our experience, anywhere from $3.66 up to $4.66, $4.79, in that area.

THE COURT: You mean, after discounts.

THE WITNESS: Yes, the effective consumer price.

THE COURT: What is the range again?

THE WITNESS: From around $366 to around $4.75, in that area, $4.79.

THE COURT: What would you suggest it would be for the $5.98 album?

THE WITNESS: We would assume that it would be between $4 and $5, or in certain cases would be considerably less.

THE COURT: What would be the range?

THE WITNESS: I would think around $3.50 up, $3.49.

THE COURT: Up to $5?

THE WITNESS: Yes.

THE COURT: So I understand what point you are making, you were asked if you could still make a profit on a $5.98 price, right?

THE WITNESS: Yes.

THE COURT: Mr. Posner had been asking?

THE WITNESS: We were discussing between us.

THE COURT: And he came and consulted with you?

THE WITNESS: Yes.

THE COURT: What did you give him in that regard again?

THE WITNESS: I gave him my opinion on the price necessary to be competitive with an Adam VIII type package. I also gave him a projection of sales faced with this extra type sort of competition.

THE COURT: Let me get this.

And a projection of sales of the Rock 'n' Roll album.

THE WITNESS: Yes, sir.

THE COURT: What did you tell him with regard to the price necessary to be competitive? What did you tell him?

THE WITNESS: I told him that $5.98 would be necessary in order for our customers to compete with the television package.

THE COURT: How could $5.98 compete with $4.98?

THE WITNESS: Because the $5.98 is a suggested retail price. I don't know of any retailer in the country that doesn't discount their records.

THE COURT: So this is where the discounting comes in?

THE WITNESS: Yes.

THE COURT: What projection did you give?

THE WITNESS: We project at three different levels, a low, a mid and a high. In this particular case we projected 300,000 on the low, 400,000 in the mid range and 500,000 on the high.

THE COURT: I'm sorry. Go ahead.

BY MR. PRETTYMAN:

Q Mr. Zimmermann, is it not true that whereas the price of Root, since it is advertised on television, is in effect a fixed price, that can't be discounted, so to speak, whereas our album, going out to the normal channels can be discounted?

A Yes.

Q In terms of those figures of 300, 400 and 500,000, would you explain to us precisely what those were in our mind?

A What we had -- we had no idea, at this particular point, how heavy the television campaign mounted by Adam VIII would be, however, we assumed it would be substantial and could hurt us quite drastically, which on the one hand made us determine a different price for the product and changed our thinking considerably in terms of our projection.

We had run considerably above that on previous Lennon product.

Q Was the 300,000 the absolute lowest that you thought it would do and was the 500,000 the absolute highest that you thought it would do?

A Well, I think, you know, we are relatively conservative in our projections. The 300 --

Q Why is that?

A Mainly because we want the profit impact, when Mr. Posner finishes his work, to be as realistic as possible and obviously if you sell more than what your high figure is, you know you are okay. If you sell less than your low, you could be in trouble.

So we tended to be quite conservative.

Q Right.

I show you what has previously been marked and entered into evidence as Plaintiffs' Exhibit 110 and

ask you if those figures were prepared under your general supervision.

A Yes, they were.

Q To the best of your knowledge, do they accurately reflect the sales of the various Lennon albums as of the date shown?

A Yes, that is correct.

Q All right.

I call your attention to the last few lines of this exhibit and ask you to explain to me what these three figures are here.

In the first line, which takes in all five of the albums that we have released --

Q Except for Rock 'n' Roll?

A Except for Rock 'n' Roll, excuse me -- the average was 644,000 per release.

THE COURT: Average of what?

THE WITNESS: Six hundred --

MR. PRETTYMAN: 644,000.

THE COURT: How many albums?

THE WITNESS: That is five albums, your Honor.

MR. GRANETT: That is the average per album.

Q That's the average per album.

A Yes.

THE COURT: These were the five Lennon albums or the four rock and roll?

MR. PRETTYMAN: Not the four. It includes one afterwards but doesn't include the rock and roll.

Q Incidentally, Mr. Zimmermann, these are domestic sales only?

A Yes.

THE COURT: All right. Go ahead.

A The second --

THE COURT: These are U. S. sales?

THE WITNESS: Yes, the U. S.

MR. PRETTYMAN: Give me one second, your Honor.

I'm sorry. I have been corrected. It is five prior. It doesn't include the Shaved Fish.

MR. BERGEN: Or Rock 'n' Roll.

MR. PRETTYMAN: Or Rock 'n' Roll.

A Okay. The second line, we pulled out for terms of comparison an album by the name of Sometime In New York City primarily because it had a very low sales history, it was not entirely a John Lennon album. There are artists who appeared on it.

So we sought to take that out as it was not what we consider up to the normal standard of Lennon

recordings.

Q What was the average with that figure taken out?

A 764,000.

Q What is the third column?

A The third column is three albums; however, as we took out Sometime In New York City because of its relatively under par experience, we also took out the best album, which was Imagine, which had sold a million and a half units.

THE COURT: What is the name of that?

THE WITNESS: Imagine.

MR. PRETTYMAN: I-m-a-g-i-n-e.

Q In other words, you felt that if you took out the very highest and very lowest so as not to distort the average; is that essentially what you are doing?

A That's right, it was more realistic.

MR. BERGEN: May we have which lines are included in the last names, the names of them, please?

A Plastic Ono Band, Mind Games and Walls and Bridges.

MR. BERGEN: Thank you.

A That averaged out at 401,000.

THE COURT: Is that all shown in the exhibit?

MR. PRETTYMAN: Yes. Would your Honor like to see it?

THE COURT: Yes. The August 1st date, what does that mean? Down in the lower part of the exhibit. Have you got a copy?

THE WITNESS: Yes.

THE COURT: What does August 1st mean?

THE WITNESS: That was the date of the sales through that point.

THE COURT: August 1st of what?

THE WITNESS: I assume 1975.

THE COURT: All right. Okay. Go ahead.

Q Have, in fact, the sales of Rock 'n' Roll declined below $362,000 subsequent to this, subsequent to August?

A Yes.

Q Do you know approximately what they are, the latest figure?

A Right now about 340 --

Q Is there a later figure than that?

A 340 records and tapes.

THE COURT: Can I hear what the sales figure is now?

MR. PRETTYMAN: What we wanted to correct,

your Honor, was that you asked what the August 1st figure was.

THE COURT: Okay.

MR. PRETTYMAN: That actually means average instead of August, Avg.

THE COURT: Avg. Okay. Thank you.

Q I see. So the latest figure for Rock 'n' Roll that you have is 342?

A Yes.

Q First I will ask you for a conclusion and then for your reasons for it. Would you tell me --

MR. SCHURTMAN: Your Honor, could I clarify the timing on one point? Are these computations he made at the time he gave those projections?

MR. PRETTYMAN: No, no. This had nothing to do with --

MR. SCHURTMAN: This is not related.

THE COURT: This is for the litigation.

Q Would you tell us, based on your experience and judgment, what you think Rock 'n' Roll would have sold absent the competition from Roots, if Roots hadn't existed?

A Our original thought on Rock 'n' Roll, and this goes back sometime before February of 1975, and

just some of the most preliminary sorts of marketing thoughts, was that the album was a natural for a television promotion. We had had some experience with other television promotions that had worked out extremely well and we had been very successful at.

Q We better stop and make sure we understand. When you say a TV promotion, do you mean advertising on television rather than the type of sale that Mr. Levy was talking about?

A Right. A thrust -- just using that media.

Q For advertising. Right.

MR. SCHURTMAN: I'm going to object to counsel's question. Mr. Levy wasn't talking about it.

THE COURT: Overruled. Please.

MR. SCHURTMAN: I think it is an important point. I can't object to your Honor's statements but I can certainly object to Mr. Prettyman's when he uses Mr. Levy's name.

A That would have been a $6.98 album which would have given us a good margin to move in. We would have anticipated, based on our previous experience, of selling in the neighborhood of 700 to 750,000 albums.

Q All right.

Would you tell us, sir, as much as you can about

what impact you think that the Roots album had upon Rock 'n' Roll and upon Mr. Lennon and Mr. Lennon's other albums?

A Well, I think it created, number one, a tremendous amount of confusion, particularly in three areas; number one, the consumer area, which is most difficult for me to evaluate; but number two and three I think I could evaluate quite thoroughly. Number --

THE COURT: Speak a little more this way, please.

THE WITNESS: Okay.

The second area being that of Capitol's customers, both retailers and jobbers. Because of the urgency of release, they were informed and had to know that there was the possibility of a competitive package being marketed by Adam VIII on television.

In terms of the third area or in terms of our own field, sales and promotion force, who were not only put under great pressures because of the time limit, were also told that -- in fact we used them to monitor our television stations around the country over one weekend--the second weekend in February -- to find out if indeed these television spots were running and where they were running.

MR. SCHURTMAN: Your Honor, I move to strike the witness' testimony as being completely conclusory at this point. He says there was consumer confusion, customer confusion. If defendants intend to of details, fine, but if not I move to strike the testimony.

THE COURT: I will allow it. I will overrule the objection.

Q Go ahead.

A So in those particular two areas we were substantially set back mainly because of the uncertainty from our customers and our own people in the field.

Q Did you in fact receive reports about customer reaction?

A Yes. People wanted to know what the devil is going on. They were worried about their own image as a retailer or as a merchandiser of records.

They didn't know whether this album would be offered in the case of a jobber to one of his customers at a lower price backed up with a major TV package. There were some obvious concerns.

Q Was the concern --

MR. SCHURTMAN: May I have a continuing objection to these conclusory answers?

THE COURT: Overruled.

Q Was the concern expressed about the possibility that the Roots album might subsequently appear in retail distribution channels and compete directly with some of your customers?

A Yes.

MR. SCHURTMAN: I object to that as leading, your Honor.

THE COURT: Well, let's try to move along a little bit. I will overrule it.

Q I show you what has been previously marked and entered into evidence as Plaintiffs' Exhibit 34, which is the Roots album.

Would you give us your opinion of the quality of the appearance of that album front and back?

A I think it is of a very poor quality. It appears to be something that you would ordinarily find in a budget line record or economy record, packaging being an integral part and an important ingredient in any release.

I find this to be of extremely poor quality and demeaning not only to the artist but to the particular piece of product.

I find the advertising on the back of the thing to be --

THE COURT: A little louder, please.

A I find the advertising on the back of it to be equally demeaning to the package, to the artist.

Q In your judgment, has the release of that album and the showing of it on television had any impact at all upon Capitol or Mr. Lennon?

A I would think it could only have the most negative type of impact.

MR. SCHURTMAN: Your Honor, I object and move to strike the answer.

THE COURT: It is not responsive. You were asked has it.

A In my estimation, it has.

THE COURT: In what way?

MR. SCHURTMAN: I still object to the question and move to strike the answer.

THE COURT: Overruled.

MR. SCHURTMAN: It is a poorly generalized conclusion there's been an adverse impact.

MR. PRETTYMAN: Your Honor, this is a man --

THE COURT: Okay. I overruled the objection.

THE WITNESS: I've heard comments about it, about the quality of the spot which I hadn't personally seen.

MR. SCHURTMAN: I object to that as hearsay.

THE COURT: Overruled.

THE WITNESS: I know many of our own people have seen it.

THE COURT: Seen what, the TV or --

THE WITNESS: The TV and the package, your Honor. And all feel that it is a very much sub-standard piece of packaging.

THE COURT: You say people at Capitol?

THE WITNESS: Yes.

THE COURT: That doesn't mean much.

Q What kind of people at Capitol?

A Field people, sales people, promotion people, and also their comments that were passed on by other people they know in the industry, customers.

MR. SCHURTMAN: Your Honor, I'm going to ask for a continuing objection. This testimony is absurd.

THE COURT: Your continuing objection is overruled.

MR. SCHURTMAN: May I have the continuing objection --

THE COURT: Overruled.

MR. SCHURTMAN: -- on the record?

Q Mr. Zimmermann, you have told us about the impact on Rock 'n' Roll.

Would you tell us whether in your judgment the release of Roots will have a future effect of any kind upon any of Mr. Lennon's other albums that are still being sold?

THE COURT: I don't think he has told us about the impact.

MR. PRETTYMAN: He estimated that the sales would be 700,000 without Roots and they are 342,000.

THE COURT: But there's a big gap. Is anybody prepared to say that the difference -- he has not told me

or expressed an opinion that the difference is due to Roots; nor would I just infer it. If anybody makes an estimate of 750 and it turns out to be 342, it could be one of a dozen factors.

MR. PRETTYMAN: I'm sorry, I thought that was clear.

Q Can you tell us, Mr. Zimmerman, whether in fact that difference in your judgment is accounted for by Roots and the reason, if you do?

A Yes, I think it is, because our tactics and marketing strategies were shaped and came to because of the existence of Roots, everything from reducing the price that we would normally expect to sell a record at a suggested price of 6.98 down to 5.98. We were unable to make definitive plans to market the record with the heavy television advertising budget.

From the time we received the finished components until the time that the record was actually shipped to our customers was a week. All of the merchandising and advertising components and many of the really fruitful ideas about entering into the marketing of a record are really taken from not only the record but from the graphic of the album jacket.

In other words, we try to tie in and use, in the

area of creative merchandising, use the elements of the graphic of the cover. This is a process that generally takes about six weeks.

As a result of putting this record out in a week, we were unable to not only develop a proper long-range and hard impact plan on the day of release -- however, even the support ingredients that are necessary to properly merchandise the product were not available for a period of four to six weeks after release.

Q Were you in effect preempted from television by virtue of the competing advertising by the Roots album?

A Yes.

MR. SCHURTMAN: Your Honor, before he answers that question, I would like to move to strike his testimony. He is again giving pure generalities. If your Honor wants to accept the generalities, I can't help it, but I do want to state my objection on the record.

THE COURT: Overruled. You can cross examine.

Q Your answer was yes?

A Yes.

Q In your judgment, did the impact of this particular cover on television, did that have an impact on sales, too?

A Yes, in my estimation, it did.

THE COURT: Which cover?

MR. PRETTYMAN: The Roots.

In other words, the Roots album.

MR. SCHURTMAN: I move to strike his last answer unless a basis is set forth for the judgment.

MR. PRETTYMAN: He's just stated the basis for it, that he thought it was shoddy product.

MR. SCHURTMAN: What's the causal connection?

THE COURT: I will take the testimony. Overruled.

Q Did you participate in the discussions and the decision to reduce the price to 5.98?

A Yes.

Q Did you advise 5.98?

A Yes, I did.

Q What was the consideration that led you to advise 5.98?

A It was, as I testified before, it was purely from a competitive angle in that we had an idea of the price range that the Roots album would be offered at, and we felt in order for our customer, the retailer, to be competitive, he must have that reduced price.

Q If there had been no Roots album, would Rock 'n' Roll have been sold at 6.98?

A Absolutely yes.

Q Does Mr. Lennon normally make a contribution to the jackets that Capitol puts out?

A Yes. Our Art Department on all previous releases have worked extremely close with Mr. Lennon.

Q Even after Mr. Lennon gives a final approval to the overall plan, does he ever participate even thereafter in making last-minute changes and additions and improvemenst?

A As memory serves me, yes. I have not worked directly with Mr. Lennon on this, but, as memory serves me, he does at periods.

Q When news first arrived of the television advertisement of Roots, were your sales people instructed around the country to keep an eye open for the advertisements?

A Yes. We called them and asked them to spend the weekend monitoring their television sets.

Q Was it as a result of that that you got the number of these comments back about the advertisement?

A Yes.

Q And about the cover?

A Yes.

Q Do you have a judgment as to the affect of the Roots album on the sale of Shaved Fish?

A I think because of the poor quality of the cover, of the advertising, and I think of a demeaning nature of almost the status of the artist's product, and as a result of the confusion and lack of the opportunity to properly market the Rock 'n' Roll album created by the rush and everything else we have talked about, it certainly did hurt.

MR. SCHURTMAN: Your Honor, the question was addressed to Shaved Fish. He answered in terms of Rock 'n' Roll.

THE COURT: No.

MR. SCHURTMAN: It's just fine with me but --

Q You meant in fact on Shaved Fish?

A Yes, I think in terms of the market place that we must deal with, in marking up our product, a great deal is hinged on our future track record.

In other words, what the previous album or several albums have accomplished. And any negatives are taken in full account by our customers and by the consumer.

Q Do you feel that Mr. Lennon was demeaned as an artist as a result of that album?

A Yes, I do.

Q Do you have a judgment --

THE COURT: What album?

A Demeaned by the Roots album.

MR. PRETTYMAN: I'm sorry, your Honor.

Q Do you have a judgment as to the effect in terms of numbers on Shaved Fish as a result of the Roots album?

A Yes. We feel that our sales experience could have been about a hundred fifty thousand higher if we had been able to -- or if the situation hadn't existed, that we would have gone out into a very positive marketplace. The impact would have been that much more substantial.

Q Do you have the right to take songs from Lennon albums that have already been made and make compilations of them for the future?

A Yes.

Q Is there a strong possibility that such compilations will in fact be made and sold?

A Yes.

Q Do you have any judgment as to whether the advertisement, sale and distribution of the Roots album will have any impact upon such repackaged or albums or compilations?

MR. SCHURTMAN: Your Honor, I object. This is pure speculation. So far the witness hasn't given us any underlying facts. He can have a judgment as to anything.

THE COURT: It's speculative. It's the kind of evidence that people would put in on this situation. We have just got to hear it and evaluate it. I will allow it.

Overruled.

MR. PRETTYMAN: The cases are --

THE COURT: Go ahead.

Q Do you have a judgment as to whether there would be any such effect?

A Yes, I think there would be, and I think we have already felt that effect on the results with Shaved Fish, and it's an on-going, almost Domino theory that success breeds success and lack of it or mediocre success in terms of people's thinking about product will carry through unless they get a tremendous -- you know, some great force of circumstances can change that.

Q Can you put a figure on the amount of the effect there might be on any such future repackaging or compilations?

A I would have to think our experience on Shaved Fish would be relative to any future repackages, which would be in the neighborhood of probably a loss of a hundred fifty thousand sales.

THE COURT: Each?

A Yes, sir.

MR. GRUMBACH: That's a hundred fifth thousand albums; is that correct?

THE WITNESS: Albums and tapes, combination.

MR. PRETTYMAN: Albums and tapes.

Q Mr. Zimmermann, have you been part of the effort at Capitol in your various offices to build up and support the image of Mr. Lennon as a major artist?

A Yes.

Q Can you give us some idea of the amount of effort that has gone into that over the years, both in terms of money and any other type of effort?

A Well, I think, you know, we have always, because of Mr. Lennon's stature, the importance of his recordings, have always attempted to make the best possible plans in terms of marketing his product, the quality of advertising, the quality of packaging, the whole public relations or press effort has been above what you would normally expect on behalf of Mr. Lennon's product.

I mean, those are in general terms.

Q Do you have any idea how much money has been spent on enhancing both the Beatles and Mr. Lennon?

A Oh, millions of dollars.

Q Do you feel that the Roots album has had an

adverse impact upon those efforts?

A Of course.

It was a very negative thing to happen. And people tend to remember the most recent event.

MR. SCHURTMAN: I move to strike that testimony.

THE COURT: Overruled.

MR. PRETTYMAN: Would your Honor give me just one second?

THE COURT: Yes.

MR. PRETTYMAN: That's all I have.

THE COURT: It's 1 o'clock.

We will recess now until 2:15. I need to take a criminal matter, so the lawyers will just leave.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

(In open court.)

MR. PRETTYMAN: Your Honor, in my usual fashion, I have forgotten just one or two questions.

In this case, I have forgotten a whole exhibit. Can I ask that this be marked CU.

xx (Defendants' Exhibit CU marked for identification.)

xx D O N Z I M M E R M A N N, resumed.

xx DIRECT EXAMINATION (Continued)

BY MR. PRETTYMAN:

Q Mr. Zimmermann, I show you what has been marked Defendants' Exhibit CU for identification and ask you, first, does Mr. William -- who Mr. William Burkhalter, who he is?

A Mr. Burkhalter is in charge of our Market Research Department.

Q Is that department in turn within your jurisdiction?

A Yes, it is.

Q So that in effect Mr. Burkhalter works for you?

A Yes.

Q Will you tell us what Defendants' Exhibit CU

for identification is and whether you received a copy of it?

A I did receive a copy of this document. It is a report instituted by Mr. Burkhalter at the bequest of Mr. Tillinghast, from our Legal Department, in which we retain services of a company called Identamatch, who verifies television commercials.

They have a monitoring service.

Q The underlying print out would have been sent from Identamatch?

A Yes.

Q I take it from the face of this that the underlying material -- it speaks for itself as to what it is.

MR. PRETTYMAN: I offer it, your Honor.

MR. SCHURTMAN: Is the purpose to show that the commercials were on the air from February 10 to 16?

MR. PRETTYMAN: The purpose of this is to support the next witness, really, and that is to show that there were in these particular markets during these dates, 59 spot announcements on the Root album.

MR. SCHURTMAN: That's the purpose? I have no objection.

MR. PRETTYMAN: I am now through with Mr. Zimmerman. I guess there is no possibility at all of having

this next gentleman on for a few minutes to put this exhibit in, is there? He's been waiting all morning.

MR. SCHURTMAN: I did not object to the exhibit.

THE COURT: We can do that.

MR. PRETTYMAN: Thank you so much. He's been waiting. I am through with my examination so --

THE COURT: You'll just be available for cross after this other gentleman is concluded.

THE WITNESS: Yes, sir.

(Witness temporarily excused.)

MR. PRETTYMAN: Could you mark this CV for identification.

xx (Defendants' Exhibit CV marked for identification.)

xx C H A R L E S P E T T Y, called as a witness by the defendants, having been first duly sworn by the Clerk of the Court, testified as follows:

xx DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q I show you Defendants' Exhibit CV for identification and I ask you, first, what is your present occupation?

A I am in the advertising business with J. Walter Thompson.

Q What is your position with them?

A Spot broadcast supervisor.

Q Did Capitol give you some figures and ask you to do some research from them, from documents that you have?

MR. SCHURTMAN: Is Mr. Petty being called as an expert witness?

MR. PRETTYMAN: No. I mean only in the sense that what -- al he has done is to go into books which are available and bring out some information. Anybody can look at them.

A I was given these schedules and asked to determine the audience delivery.

Q Do you have with you the underlying books that-- from which you picked out these figures?

A Most of them I have, yes. The original source material is from large volumes. I brought with me the individual market books for those markets which were available this morning.

Q Would you hand me those --

THE COURT: I didn't understand that. What does it show?

MR. PRETTYMAN: What this is is this: The last document shows that there were 59 spots during a certain

period in certain cities. He has taken those 59 spots over these TV channels for those cities and taken two different rating services, one is Neilson and one is ARB, which he will explain, which estimate the number of homes which are watching those channels at particular times.

I am going to clarify as to the particular times here.

THE COURT: All right.

The exhibit number is what?

MR. PRETTYMAN: CV.

Q Mr. Petty, I take it that there is obviously a larger audience participation at some particular hours than others?

A That's correct.

Q And since we didn't know what hours were represented by the spots that we gave you, what did we ask you to assume in this exhibit?

A We assumed that all sports fell in the 11:30 to conclusion time period.

Q And is that the lowest time period there is, that is, the lowest rate that is applied?

A Not necessarily.

Q Is there --

A In the case of these particular stations, which

are primarily independents and UHF stations, the ratings will be very low.

Q Would you tell us what ARB is, sir?

A Yes. American Research Bureau. Here is their book.

Q What do they purport to do?

A Each of these services, through diary methods, estimates the audiences available for a specific program at a specific time in a given market.

Q What about the Neilson?

A It does the same.

Q So that in effect these are two different services attempting to gage the same thing?

A That's correct.

Q What do the final figures represent, that is the final figure under ARB is 1,339,000, is that people or homes?

A That is household impressions.

Q So there could possibly be more than one person in the house watching that particular program?

A That's correct.

Q And the same thing would apply for Nielson, that they would be homes?

A That's correct. Each of these is a gross total.

Q Explain what you mean by that?

A Those are not unduplicated homes, necessarily. It could be the same number of homes time after time after time.

Q I understand.

MR. PRETTYMAN: I offer this in evidence. His books are available for you to see.

MR. SCHURTMAN: Your Honor, I have to study that.

BY MR. PRETTYMAN:

Q The exhibit that you have shown me is supposed to indicate that that number of homes would be watching that particular spot if it were being shown at that time on that station in that city, is that correct?

A That is the average number of homes during the 11:30 to conclusion time period. There would be more earlier in the evening, fewer later in the evening.

MR. PRETTYMAN: Thank you.

2b

MR. SCHURTMAN: Can I have a couple of clarifying questions?

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q In the first column, for example, in Baltimore, where you mention 11 spots. You then say,"Homes per spot 3,000," you multiply by 11 and come to 33,000 would those be the same homes? Do you have 33,000 separate homes?

A No, not necessarily. It could be the same --

Q They could be the same 3,000 homes?

A Each time, yes.

Q Over and over and over again?

A If you had only the same group of people watching the same program, you see, all the time, it would be that.

MR. SCHURTMAN: Even though Mr. Prettyman says this is not an expert witness --

MR. PRETTYMAN: I can't hear you.

MR. SCHURTMAN: Even though Mr. Prettyman says this is not an expert witness, this is obviously not fact testimony that was brought out in discovery. I have no objection to it provided I am given an opportunity to verify it. And I would want to cross

bsrf 2 Petty-direct

examine the witness on a couple of points.

THE COURT: All right. We will receive it on those conditions.

MR. SCHURTMAN: Do you have any more questions?

MR. PRETTYMAN: No.

(Plaintiffs' Exhibit CV received in evidence.)

xx

MR. PRETTYMAN: I want to make clear, your Honor, that these aren't the only cities; that the record shows that these aren't the only cities, that these are just certain of those cities.

THE COURT: Let's take Exhibit CU, do you have a copy of that? I didn't have these exhibits when you were questioning so I am afraid I don't quite appreciate the significance. Do you have a copy of -- copies of these exhibits so I can just talk about them with you?

MR. PRETTYMAN: I have an extra copy of that one, and I am not sure I have an extra copy of the other one.

THE COURT: Look, Exhibit CU has this listing of Baltimore, Chicago, Cleveland, Detroit, Minneapolis, New York, two stations, Philadelphia, Pittsburgh, one station in each city except for New York, two stations, and then it has I guess an analysis of the exact moment when these were -- when the commercial was on on those

stations, right?

MR. PRETTYMAN: I believe that is correct, yes.

THE COURT: And you are saying that CU shows 59 commercials --

MR. PRETTYMAN: Spots, yes.

THE COURT: By your not saying that this is only part of the TV coverage which actually existed during that --

MR. PRETTYMAN: The full list -- what purports to be a full list is --

MR. BERGEN: Exhibit AV, your Honor, which is the composite of the bill of particulars, it has the full list.

THE COURT: Where is AR?

MR. BERGEN: We are searching for it right now.

(Pause.)

THE COURT: Is this what was attached to the brief?

MR. PRETTYMAN: Attached to the bill of particulars. It is Exhibit AR.

MR. BERGEN: It is the same thing, your Honor. I didn't realize that that was in evidence that is why I

attached it to the brief, but it is the same schedule.

THE COURT: That is fine. So in other words, if I put Exhibit AR in this brief I will be doing the right thing, is that right?

MR. PRETTYMAN: Yes.

Plaintiffs' AR. No, I am sorry, Defendants' AR, but Plaintiffs' bill of particulars.

THE COURT: Why did you make the selection you did in CU?

MR. PRETTYMAN: We asked this research group -- they have certain major cities that they cover, and they cover all the time, as I understand it, and you can ask them for a particular commercial and ask them to show every time that it played. It shows the major cities just for this limited period and then they come back and give you that information.

THE COURT: Now I understand CU. What is CV?

MR. PRETTYMAN: We gave this -- we told this gentleman that these 59 spots had appeared on these stations in these cities, and we asked him to look under these two surveys to see the estimates of the number of households that would have been watching those spots on those stations in those cities, and we assumed --

THE COURT: Each spot?

MR. PRETTYMAN: Yes. And we assumed -- you add it all up, yes, the total figure would be the total number of people looking at the total number of spots, with the one exception, that if you have a duplication of homes the people may be, in some instances, the people, same people looking two nights later that looked two nights before.

THE COURT: Baltimore, 11 spots over Tuesday the 11th through Sunday the 16th. The ARB column has 3,000 homes per spot, total homes 33,000.

Mr. Petty, I guess somebody asked you about this, but I am not clear, I didn't have the exhibit before me.

How do I know, is this 33,000 different homes or is it 3,000 different homes or don't you know?

THE WITNESS: You can't be sure unless you have an unduplicated cum run against this.

THE COURT: I can't hear you.

THE WITNESS: You can't be sure unless you have an unduplicated cum run against this. It is unlikely that these are 33,000 individual households.

BY MR. PRETTYMAN:

THE COURT: What is it? Is it likely that is 3,000 households?

THE WITNESS: Probably more than that.

THE COURT: About how many would it be?

THE WITNESS: I couldn't even take a guess. Somewhere between 3,000, 11 times, and 33,000. You just can't tell from the rating information available how many of the household impressions are duplicated.

THE COURT: What am I supposed to draw, 1,339,000 households saw it or that some lesser amount of households saw the commercials in those seven or eight cities?

MR. PRETTYMAN: You know in excess, since you have at least one person per household and that you have an average of more, I think you can assume that more than a million and a half saw the commercial during this particular time period with this exception, and that is that some of the people may have seen it several times.

THE COURT: How do you get the million and a half?

MR. PRETTYMAN: That is what the total shows right there.

THE COURT: He has already said that it

probably isn't a million and a half different people or a million and a half different households, it is more like -- see, that is the addition of the right-hand columns. Why don't you add up the left-hand columns and then that is what the witness is indicating it is more likely to be, in different households. Is that right?

MR. PRETTYMAN: May I take a look at it, please? I'm not sure.

Let's let the witness explain that.

Q What does the homes per spot mean?

A That is the number of individual households per spot on the average during that time period.

The gross cums, the million-three and the million-five, that is a gross household impression figure. It is unlikely that each of those was a separate household.

Q So the point is that it is somewhere between the column on the left as an absolute minimu, and the column on the right as an absolute maximum?

A That is correct.

Q All right.

THE COURT: Okay.

A It would probably be closer to the column on the right. The million and a half would be 800,000,

perhaps, something like that.

MR. SCHURTMAN: Your Honor, the witness told you a few minutes ago he couldn't even guess. Now he suddenly comes up with a specific figure.

THE COURT: What is the basis for saying the 800,000?

THE WITNESS: Just experience.

THE COURT: What experience?

THE WITNESS: I've been at it for a good many years. I've involved myself with the unduplicated cum studies that have been run for me.

THE COURT: What is an unduplicated cum study?

THE WITNESS: The information here, the 3,000 homes per spot, for instance, is based on diaries done by the rating services. The rating services would then go back and they would check out all the diaries to find if a specific group of spots had been seen more than once by the same household. And they can, on that basis, come up with how many households had seen this group of spots, which would give you an unduplicated number of households.

THE COURT: So you had experience with the duplicated cum studies; is that what you say?

THE WITNESS: Unduplicated cum studies.

dhrf 4 Petty-direct

THE COURT: This isn't unduplicated cum study, is it?

THE WITNESS: This is not.

THE COURT: This is not.

THE WITNESS: These are gross figures.

THE COURT: Okay. Any other questions? I guess you have cross.

MR. SCHURTMAN: I would like to see the exhibit. I don't have copies.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SCHURTMAN:

MR. SCHURTMAN: Your Honor, I do point out again that this witness is turning himself into an expert at this point.

THE COURT: So?

MR. SCHURTMAN: In our interrogatories we asked Capitol to identify all experts. They didn't do so.

MR. PRETTYMAN: I didn't offer him as an expert. I gave him for the figures he picked out of the book.

MR. SCHURTMAN: To the extent that any of his testimony is expert, I ask that it be stricken.

THE COURT: Let's go on.

Q Am I correct in understanding that even --

MR. PRETTYMAN: What was your Honor's ruling on that?

THE COURT: I'm not going to strike.

Q Am I correct in understanding that even the homes per spot column is based on an estimate?

A That is correct.

Q How is that estimate arrived at?

A Each of the services receives diaries from a cross section of the viewing public in a given market.

Q Do you know how big that cross section is?

A It will vary by market. I can tell you the number of diaries in relation to the number of households in each market.

Q The only point I'm driving at is, do you use certain sample households and then multiply it in order to get the estimate?

A I believe that is how they do it, yes.

Q Is that the way it is done?

Do you have any information as to the type of audience that was watching these spots? This is between 11:30 p.m. and midnight, I take it.

A No. It is between 11:30 and conclusion. Usually it is 1:00 o'clock in the morning.

Q Oh, 1:00 o'clock in the morning.

Do you have any information as to the nature of the audience, the type of audience?

A The two sources which are industry accepted standards do break the audiences down by section, by age. Various age breakdowns.

Q I see. But this exhibit does not reflect that, does it?

A No, it doesn't.

Q Do you have any experience as to how many viewers turn off commercials that don't watch them?

A Well --

Q Or go for a beer in the kitchen while the commercial is on?

A I couldn't tell you based on these numbers how many of the people actually saw the commercial, no.

Q All right.

REDIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Petty, if you had taken the hours of, let's say, 6:00 until 11:00, somewhere in there, instead of 11:00 until closing, would these figures be higher?

A Considerably.

Q Thank you.

THE COURT: You may step down, Mr. Petty.

(Witness excused.)

THE COURT: We will be in recess.)

(Recess.)

2b dhe 1

THE COURT: We can resume. I just wanted to call your attention to something in connection with this issue of mitigating damages. Restatement of Torts, Section 918 deals with the problem, and the rule that I derive from that summary and the discussions that even in the case of an intentional tort there is a dimunition of the amount of damages which can be recovered if a person deliberately refuses to protect his own interests in a way which would have mitigated his damages.

So we haven't looked up any cases, but we did find this statement in the restatement of torts. That's the original restatement.

I don't think they have issued a second series on that, up to that section, but maybe my library is out of date. But anyway, I'm referring to the restatement of Torts, the original version, Section 918.

So it seems to me it is enough to raise the issue that we talked about before lunch.

Okay. Do you want to cross examine Mr. Zimmermann.

MR. SCHURTMAN: Yes, I do.

THE COURT: Okay.

xx DON ZIMMERNANN, resumed.

xx CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Zimmermann, when you gave your projections of potential sales of Rock 'n' Roll and when you made your decision in the pricing of the album, were you consulted by anyone other than Mr. Posner?

A Yes.

Q Who?

A Mr. Brown Meggs, who at that time was a chief operating officer and executive vice president of Capitol.

THE COURT: What's the name?

THE WITNESS: Brown Meggs, your Honor.

MR. PRETTYMAN: M-e-g-g-s.

A I also consulted other members of the marketing staff, including the sales area.

Q Did you discuss the matter with Mr. Lennon?

A Yes. In a preliminary discussion.

Q When did that preliminary discussion take place?

A I don't have an exact date but it was around the first week of February.

THE COURT: Keep your voice up. It was around what?

THE WITNESS: The first week in February, your Honor.

Q When did you first learn that Capitol would release the Rock 'n' Roll album at some point?

A At some point? Towards the end of 1974.

Q Did you at that point start to make marketing plans?

A Yes.

In a general sense because to effectively develop marketing plans you must have a feel for not only the product but for the graphics involved with the product.

Q Let me read to you one sentence from a statement of facts which was submitted by the defendants, and that says, at a meeting in New York on January 28, 1975, "Final Plans" --

MR. PRETTYMAN: Can I have the paragraph number, please.

MR. SCHURTMAN: Yes, it is paragraph 94.

Q "At a meeting of the Sherry Netherlands Hotel, which was attended by Roy Kohara, the head of Capitol's Art Department, and Dennis Kileen, the head of Capitol's Merchandising Department, final plans were presented to and approved by Lennon for the entire advertising promotion and merchandising of the Rock 'n' Roll album."

Then there's a discussion about the graphics and then it says, "There was an extensive marketing campaign

discussion, including various media that would be used. Kileen ran down a complete marketing campaign with the others present and Lennon approved it with some minor corrections."

Were these final plans presented with your approval?

A They were, upon Kileen and Kohara's return from New York City. I don't recollect the exact date that that would have happened.

However, in order to do the mechanical production work, the actual art must be in our hands and must receive some other treatments in terms of color separations, production work in ad lay out, production work regarding the television and radio spot; all of which the art and the -- for the audio components, the record must be available.

Q Were these plans that were presented to Mr. Lennon on January 28 in writing?

A I don't know.

Q Have you ever seen them?

A I have, but I don't know -- I have seen them on a Capitol document in which we put together a marketing plan on every album we release. Whether it was in that form or not --

THE COURT: What about the release? I didn't

hear you. The document is what?

A The document is a marketing plan which is developed for every album that Capitol releases. It varies in its extent, and varies in --

THE COURT: When was this document made up?

THE WITNESS: If the media place on the 28, I think probably in its final form it would have crossed my desk three or four days later.

Q As a result of this alleged rushing Rock 'n' Roll into an early release, did you make any changes in the marketing plans on the promotion plans from the ones that had been approved by Mr. Lennon on January 28?

A I don't think so.

Q With respect to the physical production of the lacquer and the final master tape, do you know when that was done by Mr. Lennon?

A It was delivered to us, I believe, on February 7.

Q Was it delivered to you before Mr. Menon made his final decision to rush the release of the album?

A It was within a few hours of each other, as I recall.

Q The fact is that Mr. Lennon made the final lacquer master before Mr. Menon decided to rush the release, did he not?

A I'm not aware of that. However, I know Mr. Lennon made the lacquer master in New York. It was delivered in California on the 7th.

Q Is it your contention that there were any technical flaws in the lacquer master that Mr. Lennon made?

A Technical flaws? Would you explain that, please?

Q In the quality of the master, in the quality of the recording.

A Not that I'm aware of.

Q Would it be correct to say then that this alleged rushing of the release didn't cause any changes in the marketing plans as approved on January 28 and didn't cause any imperfections in the quality of the photograph record?

A It caused the marketing plan and all the ingredients which resulted from that marketing plan, to happen at a later date; in other words, it was sporatic over a four or six week period. From the time the lacquer master was delivered until the release of the album, it was just in one week's time. It is impossible to develop the other components in terms of point of purchase merchandising, the televison spot, the radio spot. Just the placement of the consumer advertising usually takes a four-week lead time

after the actual production of the advertising.

Q What were the target dates in your master plan, in the original plan?

A We talked about the spring.

Q Spring is a broad concept.

A We had not received delivery of either the album or the art and we usually would plan, once we received that.

So that our plans can be well made.

THE COURT: Is the document in evidence for that Capitol plan?

MR. SCHURTMAN: Never seen it, your Honor.

MR. PRETTYMAN: I haven't seen it either.

THE COURT: What I don't understand, because it is an abstraction to me, apparently our differentiation between the marketing plan and components of the plan. But it is all an abstraction to me, because I don't know what the marketing plan was and I don't know what the components would be and I don't really know what you did to implement it.

THE COURT: The marketing plan, your Honor, would be basically an outline of the efforts taken on behalf of the album by Capitol's marketing department. They would include --

THE COURT: What were they in this case, what was the marketing plan?

THE WITNESS: I don't recall specifically, but a couple of the ingredients were a poster, manufacture of a T- Shirt, of course radio spot --

THE COURT: There was a poster --

THE WITNESS: Yes.

THE COURT: -- then a T-shirt?

THE WITNESS: Right.

THE COURT: What else?

THE WITNESS: A radio spot, a commercial spot. Television commercial.

THE COURT: What else?

THE WITNESS: The mechanical art necessary for trade advertising.

THE COURT: What else?

THE WITNESS: The mechanical art necessary for consumer advertising. Whatever point of purchase materials that we developed on this, and I don't specifically recall what they were.

THE COURT: As of the 28th, in what detail was this marketing plan, was there an actual design for a poster, was there an actual design for a T-shirt, was there an actual strip, or whatever you do, for a radio spot and so

forth, or was there just a list of the six things, or what was it?

THE WITNESS: It's a list of the ingredients will encompass the total plan. No mechanical or production work has begun at that point.

THE COURT: As of the time of the plan?

THE WITNESS: Yes, sir.

THE COURT: When you say "no mechanical or production work" you mean no -- let's take the poster, had a poster been designed?

THE WITNESS: No, sir.

THE COURT: Had a T-shirt been designed?

THE WITNESS: No, sir.

THE COURT: Had a radio spot been written?

THE WITNESS: No, sir.

THE COURT: Had the art work been done for the advertising?

THE WITNESS: No, sir.

THE COURT: When was all that done?

THE WITNESS: As I remember --

THE COURT: Was some of it left out ultimately?

THE WITNESS: Not as I remember. In fact, I think it was probably added to as we went along.

THE COURT: When was it done?

THE WITNESS: I would assume the following week, primarily because in yesterday's testimony I think Mr. Menon mentioned that there was an actual photograph which resulted in the album cover, which it was decided to obtain at the meeting of the 28th.

The photograph, which eventually became the album cover, also was a necessary ingredient in all the posters and T-shirts and that sort of marketing point of purchase material.

THE COURT: Was all this done in a week, are you telling me that?

THE WITNESS: I think it was received in a week. The production of the poster and that sort of thing is all done outside of Capitol by outside vendors who take three to four weeks from the time they receive what they need to actually run a production to deliver to us.

It takes us an additional week to ten days, because of the bulk of the materials we are talking of, to distribute it to our field organization.

THE COURT: Are you telling me -- let's take a poster.

You decide you are going to use a poster, somebody is going to draft it and somebody has to approve it and so forth, right?

THE WITNESS: Right.

THE COURT: How long does -- what are the steps abd how long do they usually take?

THE WITNESS: Generally, the poster will consist of the album art in some form. Or a picture of the artist that is also contained within the album. When we develop the album art and send it out to the people who print the actual jacket cover of the album --

THE COURT: How long does it take, usually, to develop the -- I'm sorry, you are back with the album.

All right.

THE WITNESS: From the moment we receive what we call photoready art, which is a mechanical reproduction of what the cover will look like, it is sent out to a color separator where a film is made. The film is used in the actual printing of the album jacket or the poster.

From the album film it is generally enlarged and sent out to a poster manufacturer.

He then produces and manufactures the poster, sends it to us and in turn we must redistribute --

THE COURT: Are you saying that this usually takes a month?

THE WITNESS: Yes, sir.

THE COURT: Then it takes you a week to get the

stuff in and then send it out?

THE WITNESS: Yes.

THE COURT: How long did it take in this case?

THE WITNESS: We did put a rush on it and we probably accomplished the five-week cycle in about four.

THE COURT: Do you generally try to have this poster ready at the time the record is released?

THE WITNESS: Yes, sir. It is almost essential.

THE COURT: Did you have it on this occasion when it was released?

THE WITNESS: No.

THE COURT: All right, Mr. Schurtman.

xx CROSS EXAMINATION

BY MR. SCHURTMAN (Continued):

Q I am still confused about one thing.

Did you participate or consult with your attorneys in the preparation of the statement of facts?

A Which facts, sir?

Q These are facts relating to the events in this case, and one particular statement has to do with the presentation of the final marketing plan to Mr. Lennon in January 28th.

Were you asked about that by your lawyers when they prepared this?

A No.

Q Because if you know, and if you don't know, tell me, when it says that Kileen ran down a complete marketing campaign, and when it says that final plans were presented to Mr. Lennon and that he approved them, what does that mean, what did they show him?

A They showed him pretty much what it says, a plan -- a plan of things that will be done from the plan. The plan is written on a piece of paper in its ultimate form before appropriate purchase orders and things like that are issued for the actual work being done, both within and outside of our company.

So, the plan really says, we are going to make 5,000 posters and this is what they are going to cost.

Q No.

THE COURT: There apparently is a piece of paper with a plan.

MR. SCHURTMAN: If there was, we have asked for it.

THE COURT: Why don't we get it?

MR. SCHURTMAN: We asked for it and never got it.

MR. PRETTYMAN: Your Honor, I spent three days in Los Angeles trying to get answers to interrogatories,

going over hundreds and hundreds of papers that could be in any way relevant, and I never came across this plan. I don't know whether it no longer is in existence or whether we didn't look in the right place or what, but I've never seen it myself.

THE COURT: Where is it?

THE WITNESS: It would be in Los Angeles, sir.

THE COURT: Where?

THE WITNESS: In the Merchandising Department there, in Capitol Records.

THE COURT: Just have them fly it back.

THE WITNESS: I will do that, yes.

BY MR. SCHURTMAN:

Q Prior to the time that it was decided to release the Rock 'n' Roll album as a regular retail album, did anyone ever tell you that Mr. Lennon had expressed a fear that the critics would be lying in wait for it and might pan it?

A No, sir.

Q There was no discussion about what the critics reaction might be?

A No, sir.

Q Did you in your capacity as senior marketing vice president give any thought to what the critical reaction

to this album would be?

A No, I did not.

Q Did you consider the possibility that an album of old rock and roll tunes which had been in the works for a year and a half might cause an adverse critical reaction?

A No, I didn't. I think primarily because a year and a half wouldn't be critical, as you mentioned the tunes were of historic nature and value. It was also my estimation that to a collector of both Lennon material and Beatle material, this would be an important, sort of an addition to their record collection. There is --

Q Well --

MR. PRETTYMAN: He hasn't finished.

A There is also evidence that there have been several other acts that come in my memory who have success with exactly this type of a package, doing well known older standards in rock music --

Q When?

A The Carpenters had an album that I believe went platinum and better, I'm not privy to A & M sales figures.

We had an album by the Band, which Mr. Lennon mentioned yesterday --

Q When?

A When did we have it?

Q When was the Carpenter's album?

A I think that was a year, year and a half ago.

Q Right.

A The band album was two years ago.

Q Isn't it a fact that a year and a half ago and two years ago you had what the industry has called a nostalgia craze and it was in the context of that nostalgia craze that Mr. Lennon first started recording these Rock and Roll tunes with Mr. Spector?

A I think that's true. But the nostalgiz craze was still very active a year ago when the Rock 'n' Roll album was released.

Q What else was active in the nostalgia craze?

A These albums -- in the case of the Carpenters, I think it is still active today.

Q Tell me a new nostalgia album that was released in February, 1975.

A I am not aware of it.

Q You are not aware of any? You don't know of any.

All right.

After the Rock 'n' Roll album was released, did you monitor the critical reviews in the public press?

A I am usually given copies of most of it.

O I show you the same exhibits I showed Mr. Menon --

THE COURT: We are going to get into reviews. What about them? Those are two reviews. I don't know where these records had been reviewed. I don't know whether that is a good sampling or a bad one, but if we are going to get into the subject of reviews, it is not going to mean anything to me unless I know that this is either representative or comprehensive, or something like that. Is it?

MR. SCHURTMAN: We take the position that it is.

THE COURT: Were they good reviews? What other reviews do you know of?

MR. SCHURTMAN: I know of one review which I would call fair, which was in a trade journal, not -- that is why I deliberately said "public press" when I questioned Mr. Menon and when I questioned this witness.

THE COURT: That's all right.

MR. SCHURTMAN: Something that is addressed to the consumers and not to the people in the trade. I don't know of any good reviews that were addressed to consumers. If the defendants know of any, let's see them. I haven't seen any.

THE COURT: I know records are reviewed in the

American Scholar.

Q Do you consider Rolling Stone a representative magazine in the music industry as addressed to consumers?

A It is widely read.

Q It is widely read. The Village Voice is a New York magazine.

Do you know anything about it?

A Yes.

Q Is it widely read in New York?

A I don't know exactly what the circulation is, but it is --

Q But the type of audience that would be likely to buy popular albums, are they likely to read the Village Voice?

A They are likely to read it.

MR. SCHURTMAN: These are the only two reviews I have from the public press and I want to ask the witness about them.

THE COURT: All right.

Q Have you seen reviews in either of these publications?

A I really don't recall. It's been a long time.

THE COURT: I can't hear you.

THE WITNESS: I really don't recall.

Q Without reading the entire reviews --

MR. PRETTYMAN: Your Honor, may I make an objection to this line of questioning?

Mr. Levy told Mr. Lennon, according to his sworn testimony, that he was going to take these old rock and roll songs and sell 5,000,000 copies of them.

MR. SCHURTMAN: By television.

MR. PRETTYMAN: Even with this cover that we have got. It seems for me for his representative to come in now and claim that we couldn't sell extra copies is something inconsistent.

MR. BERGEN: I join in the objection, your Honor.

MR. SCHURTMAN: Let me be heard on that.

THE COURT: Please. The objection is overruled. Go ahead.

MR. SCHURTMAN: I don't want to take the time to read the reviews into the record, the Judge has read them and has them available.

Q Would it be fair to say that on the whole they were not favorable to the rock and roll album?

THE COURT: What do you mean on the whole, those two reviews?

I don't have to have his characterization. I've

read them.

MR. SCHURTMAN: It is a foundation for my next question. My next question will be, if the reviews were unfavorable, what impact would this have on sales? This man is an expert on sales.

THE COURT: That's a perfectly fair question.

What were the reviews, to the extent you knew about it, the reviews -- obviously, if you need to you can sit here and read these ones that we have here, but to the extent you knew about them, were they favorable, unfavorable, how did you regard them?

THE WITNESS: As I recall, your Honor, they were relatively mixed, and I think that as a -- because of what's happened, the reviews received by other albums that I am aware of, that in this country the consumer press is not as influential as one might believe.

THE COURT: How did they -- how did the reviews here compare with the reviews of Walls and Bridges, or the reviews of -- I lost that exhibit --

MR. BERGEN: This isn't the exhibit that's been marked, it's a copy of it.

THE COURT: That's fine.

MR. SCHURTMAN: Mind Games and Shaved Fish.

THE COURT: How did -- what about in comparison

with Walls and Bridges.

THE WITNESS: I would think Walls and Bridges, if memory serves me, would have received a higher critical acclaim.

THE COURT: Go ahead.

BY MR. SCHURTMAN:

Q Is it your testimony that a bad review in the consumer press has no impact, no adverse impact on sales?

A I didn't say no impact. But what I said was that it is not all important in that I can think of a number of albums which have not received favorable reviews, in fact, been rapped pretty hard, that have been quite successful consumerwise.

Q Incidentally, I wasn't entirely clear on your testimony this morning.

Are you saying that because of the alleged rush the package that came out, the album cover of Rock 'n' Roll, was somehow inferior to what you would have liked to see?

A I don't think I said that, no.

Q That's not your contention, is it?

A No, but I do believe that given more time to work with it, both on Capitol's part and in conjunction with Mr. Lennon, that various things could have been done to

perhaps improve it.

Q Like what?

A I don't think we really thought about that a lot after we were off and running with the thing, we didn't have time to.

Q As a matter of fact, about the only nice thing one of the reviewers said about your album was that the package was beautiful, he liked the package, he didn't like the performance, do you recall that?

A No, I don't.

Q Would it be fair to say, Mr. Zimmermann, that since September 1971, when Imagine was released by Mr. Lennon, he has not released a truly successful album, one that sold more than, say, half a million records, that's what this exhibit shows?

A It seems to me that Walls and Bridges exceeded that.

Q According to your exhibit Walls and Bridges had net sales of 425,000.

MR. SCHURTMAN: Could I have the exhibit to show the witness? Do you have one for the witness? I want to ask him a few questions.

MR. PRETTYMAN: Your question is geared entirely to domestic, I assume?

MR. SCHURTMANN: Yes.

A I think what I recalled was the gross figure of 1974, which was over 600,000.

Q But the net figure is 425,000. My question really is, in drawing your average and on your direct testimony you explained the three averages that you came up with, did you take into consideration the fact that beginning in 1971, or early 1972, Mr. Lennon's sales popularity apparently declined substantially?

A In terms of record sales?

Q Yes.

A Yes.

Q Did you take that into account in drawing your averages?

A Yes, that's why we actually polled out Imagine.

Q You pulled out Imagine but you also polled out Sometime in New York City.

A True.

Q Suppose you simply polled out Imagine.

A We didn't think that would be quite fair.

Q Why?

A Sometime in New York City, as I testified this morning, was not what you would normally expect as a John

Lennon album.

Q It was a John Lennon album, wasn't it?

A No, it had other artists on it.

(Continued on next page.)

Q Let me ask you this, if accepting as a basis the fact that Mr. Lennon's domestic sales popularity began to decline in 1972, I suggest to you that if you simply take the records that came out after that big super hit in September, 1971, Imagine, if you add up, and I have done the addition, 164,000, 376,000, 425,000, and 456,000 -- leaving out Rock 'n' Roll -- you get a total of 1,421,000, which would show an average, if you divide by four, of 355,000 albums during that period.

Do you think that is a fair average?

A No, I think in order to have a fair average you must take out both the high and the low, or leave them both in.

I think the sales history starts at 700,000, goes to the high of over a million and a half with Imagine, then drops down to Sometime In New York City, which was not 100 per cent true Lennon album, Mind Games, 376, Walls and Bridges back up --

Q Stop at Mind Games. Was Mind Games a 100 per cent true Lennon album, to use your words?

A Yes.

Q And that sold 376,000?

A Yes.

Q Did that contain Lennon compositions?

A Yes.

Q So Lennon was performing his own compositions, he wasn't performing somebody else's old rock and roll songs?

A That is true.

Q That sold a net of 376. Rock 'n' Roll sold about 30,000 less?

A But Walls and Bridges sold 50,000 more.

Q Would you attribute the fact that Rock 'n' Roll sold less than Mind Games at least in part to the fact that Mind Games was a Lennon original while Rock 'n' Roll was not, does that have any impact on sales?

A No, I think as I mentioned before, there is a great interest in any material recorded by Mr. Lennon, or the Beatles, and there are many fans who would find this, because of the Beatles beginnings and Mr. Lennon's beginning as a recording artist, would find this of great interest because this is the era from which the Beatles grew.

THE COURT: What had been your sales estimate for Walls and Bridges, made at a comparable time to this 750,000 estimate that you gave us this morning?

THE WITNESS: I don't recall, your Honor.

Q Do you recall your sales estimate for Mind Games?

A No.

Q Do you recall your sales estimate for Shaved Fish?

A Yes, I do. Within -- not exactly, but within reason.

THE COURT: What is that?

THE WITNESS: I think it was about an average or a mid of around 500,000.

Q I am still puzzled.

In other words, you have been telling us that the averages and mid projections were 500,000 and you again repeated that for Shaved Fish, and yet at another point you said, yes, but Rock 'n' Roll would have sold 700,000?

A Oh, that was based on --

Q What was that based on?

A That was based on our earlier thinking, which I think I mentioned this morning, of their being -- of it being a very unique package in that it was not Mr. Lennon's compositions but his renditions of original performances by some very famous people performing some very famous records, and that it would be a natural marketing campaign for a heavy television campaign, because this was all before we heard of the Adam VIII venture.

Q Do I understand you correctly, you felt that because Mr. Lennon was not recording his own -- was not performing his own compositions that this would enhance the value of the album?

A Only as a television promotion.

Q What do you mean by television promotion, in this context?

A Well, in that you -- the consumer that you are attacking or trying to merchandise your product to has the broadest general demographics, and are people of an age group that would relate very much to his songs.

We had also had some pretty fantastic success with a similar type venture with older material.

Q But were you planning to put it out by TV mail order sales?

A No, no.

Q No, just advertise it on television?

A Yes.

Q Don't you advertise all your albums on television?

A Not to the extent we were going to do with this. Or to the extent that we just had come off of a Beach Boys promotion which proved most successful.

Q Why didn't -- strike that.

Did you advertise Rock 'n' Roll on television?

A Yes.

Q You did?

A But not to the extent we had originally planned.

Q What extent had you originally planned?

A Probably spending a considerable more amount of money.

Q How much?

A We really hadn't gotten to formulate the plan because of everything that was testified to here today and yesterday, but based on what we had done with another package, in the neighborhood of $150,000 to $200,000.

Q How much did you actually spend?

A On television itself.

Q Yes.

A I don't know. I couldn't testify with any accuracy.

Q So you don't really know what changes you made?

A Well, it wasn't a change because the original plan had never really been formulated, mainly because we didn't have an album in hand, and it seemed to us that in going forward with the clean meeting that you mentioned before, that our approach should be more of the ordinary media that we use for selling records.

Q Let me ask you this, Rock 'n' Roll was released

on February 13th. On February 16th, the last Roots commercial appeared on the air, after that there were no more Roots commercials on television.

I think we all agree on that fact. That was three days later. Did you then change your television plans?

A I didn't know that it had ended.

Q You had asked somebody to monitor it. You testified on your direct examination that you had all your sales people sitting glued to their TV sets.

Are you telling me that you didn't know that after February 16th there were no Roots commercials?

A I couldn't ask my sales force to sit home every weekend and monitor television. The checking service that we used, I don't know what period they were requested to check. We even -- we had no idea, or no reason to believe that the television advertising could be reinstituted.

Q Did you make any attempts to follow the Roots commercials, how long they would be on the air, when they would be taken off?

A No, we had no means that I am aware of to find that out.

Q Did you know that telegrams had been sent to the TV stations warning them that they would be sued if they

carried the commercials?

A Yes, I did.

Q You knew that. Were you interested in finding out if these telegrams were effective or not?

A Yes.

Q What did you do to have find that out?

A I believe our -- I can't remember who it was, but somebody did follow through on that.

THE COURT: What?

THE WITNESS: Somebody did follow through on that, your Honor.

THE COURT: Follow through in what way?

THE WITNESS: To check and see if in fact the commercials had been pulled or not.

THE COURT: Who was that?

THE WITNESS: I don't recall.

THE COURT: What did they find out?

THE WITNESS: That in most cases, I believe that indeed the television commercials on those particular stations had been pulled.

THE COURT: Had been what?

THE WITNESS: Pulled off the air.

Q Once you learned that the Roots album was no longer being televised, would it have been -- strike that.

Once you learned that the Roots album was no longer being advertised on TV, did you make any plans to increase your own TV coverage?

A No, we didn't, mainly because -- primarily, as I just stated, we had no assurance that the TV campaign by Adam VIII would not be renewed, if not on the stations that we had wired on other stations. We had already priced the album at $5.98, which reduced our profit margins fantastically and left us unable to spend the kind of money in television support as I mentioned a few minutes ago.

Q How much did they reduce your profit margin by?

A I have no idea, but Mr. Posner --

Q You know it is fantastic but you have no idea, right?

A I could not testify with any accuracy.

Q Incidentally, you did mention the Beach Boys album?

A Yes.

Q Which you advertised on television. Was that a Beach Boys album of other people's songs or a reissue of their own songs?

A It was a reissue of their own songs.

Q Does that make a difference?

A I don't think so. Primarily because after we didn't go with a television campaign on the Rock 'n' Roll album, we culled Beach Boy tunes which were little known to the consumer and did a similar campaign and were successful with that.

THE COURT: Did you advertise Rock 'n' Roll on TV at all?

THE WITNESS: Yes.

THE COURT: Are you able to tell me the extent of that advertising?

THE WITNESS: Not with any great accuracy, I'm not, no.

Q Were you here when Mr. Petty testified about the number of spots that Roots had used?

A Yes.

Q A total of 59 spots?

MR. BERGEN: I object, your Honor. That was only in the cities --

MR. PRETTYMAN: Only in a limited number of cities in a limited period of time.

MR. GRUMBACH: Mr. Schurtman said that we all agreed that the commercials ended the 16th. I think Exhibit AR would show that they ran through the 17th.

THE COURT: What city?

MR. GRUMBACH: It was Cincinnati.

THE COURT: Cincinnati on the 17th.

MR. GRUMBACH: Through the 17th. It started earlier.

THE COURT: All right. Cincinnati was a special problem, Mr. Zimmermann. All right.

BY MR. SCHURTMAN:

Q Mr. Zimmermann, going back to the sales of Shaved Fish for a moment, which are 456,000, were these sales enhanced in any way by the fact that Shaved Fish was a collection of John Lennon's own hits?

A Yes.

Q That did enhance the sales of Shaved Fish?

A Yes.

Q Also on the subject of Shaved Fish, I believe you testified that the sales of Shaved Fish were reduced because of the impact of the Roots album?

A Yes.

Q Now, the Roots album stopped being advertised on February 16th, except in Cincinnati where it was February 17th, Shaved Fish didn't come out until nine months later, in November 1975.

Can you explain how the advertisements in

February, assuming they had any impact at all, continued to have an impact on the sales of Shaved Fish in November of 1975?

A Yes. I think because of the tremendous confusion, the lack of our ability to create a great impact with the Rock 'n' Roll album, and its thereafter decline in sales over what we feel could have been its fullest potential if handled in a timely and organized fashion. It definitely hurt our efforts on Shaved Fish. In other words, that in dealing with a customer who sells records, he will remember that negative. He won't remember the circumstances around it, that the poster was late, the television spot was late, or -- but he will remember the confusion around it, and he will also, in going to his computer, or his inventory card, he will look and see what he did on the last album by the particular artist.

Q Mr. Zimmermann, do you know of a single customer who made a decision not to buy Shaved Fish because he remembered that he might have been confused by Roots nine months earlier?

A I don't know of a single customer that refused to buy it. However, I know through experience that customers buy off of previous sales; usually the album immediately preceding the current one offered for sale.

THE COURT: I'm not understanding you. I have to get some specifics. I don't know who you are going to produce, but I have now heard for the first time that a poster was lage, and generally I've heard a lot of generalities. I can appreciate some -- if I know that the posters were all four weeks late, or something like that, that might help me. But really, to be told that the TV campaign wasn't as big as it would have been, and the witness doesn't know what it would have been and what it was, that is extremely vague and we go on and on with this kind of vague stuff.

It isn't enough to get my hands on.

MR. PRETTYMAN: Your Honor, I think --

THE COURT: A lot of opinion about people who are trying to collect damages, and they just give opinions to back that up -- why don't you get your marketing plan and get the specifics in here and get it organized. I don't have to have all -- I don't have to have all the original records and documents, but it seems to me that there ought to be something in the way of concrete evidence.

MR. PRETTYMAN: Your Honor, if I may just comment, this is why -- one of the reasons why this is so difficult. He has just asked a question about,

you know, did you increase your TV advertising after Roots stopped?

It is perfectly obvious that to have increased our own advertising of an album where it had just been advertised to the public, the same songs were on some other albums, and they are getting complaints of confusion, that it would increase the confusion rather than lessen it. I can ask him about it, he can talk about it, can say, but how am I going to put information on that.

THE COURT: You haven't got my idea. I think I could go back through the record, and I could point to all kinds of generalities that this was not a happy situation, but unfortunately, and goodness knows I'm not eager to spend a lot of time on this case, more than I already have, but if somebody is trying to collect a lot of money for so-called loss of sales, or whatever, I'm going to have to have some specifics.

What was the marketing plan? I don't really know what it was. The document apparently exists. It is not in court. Nobody can remember, except in the most general terms, what it was. Then what happened? Exactly what happened on each time -- one of the most interesting things I've heard in the last two days

was the fact that the posters were distributed four weeks after the release of the record.

Well, that is a concrete fact. It is not somebody's cogitating, speculation, and maybe there are some other concrete facts.

If, indeed, this campaign was filled with similar incidents, then that puts meat on the bones, and I assume that with those specifics it might be possible to get some realistic picture of what went right or wrong with that campaign.

Right now, I must tell you I don't have that picture. I have a lot of opinions by people who are trying to collect a lot of money, but they are interested people.

MR. PRETTYMAN: Your Honor, I certainly doesn't --

THE COURT: And highly interested. I mean, Mr. Menon testified to some existent difficulty on a deposition, but Mr. Menon is at a very high level and I don't expect Mr. Menon to know a lot of details.

But somebody in this organization must know the details.

MR. PRETTYMAN: Your Honor, I certainly don't mean to play down the importance of details and I will do my best to get some more for you.

I must say in this case, like in anti-trust cases and a lot of cases on damages, a lot of it unfortunately does have to come down to the judgment of the person who is right out there on the firing line and who has been at this kind of work for a number of years as to exactly what the impact of this kind of competition is.

THE COURT: What were the facts? I mean, in an anti-trust case or any other kind of case there has to be the concrete facts about what went wrong. What competitor reduced his prices and moved in on the market? What happened that went wrong?

And here I am of the distinct impression that what went right or wrong with this album, it consists

of some fairly concrete facts about what happened. Why don't you get them?

MR. PRETTYMAN: All right. I will be happy to do that. I would like to say that --

THE COURT: Because for somebody to get on the stand and say we would have sold -- it is virtually meaningless, Mr. Prettyman, to have him say we originally estimated 750,000 and we actually sold only 342. It just doesn't mean anything.

He doesn't know what estimates he made for Walls and Bridges. Maybe he estimated a million for Walls and Bridges. Was it Levy's fault that it went down from a million to 342? Of course not. It doesn't mean anything.

MR. PRETTYMAN: Your Honor, if we had never had to hurry up our schedule and never had had to change anything in regard to our promotional plan, while obviously we would be in here claiming a lot less damages, we would nevertheless be in here claiming some damages for the effect that this unauthorized album had being put out on television at the same time as we were about to come out.

I could not bring you in any facts on that other than the judgment of our people, after talking to people in the field and talking to customers, hearing

reactions and so forth. We could not give you anything specific in that regard, and yet it would be an informed judgment and a judgment based on actual experience.

Now, I'm not trying to say you don't have a point about my bringing in more facts, and I will try, but I hope you are not discounting the other point, too, and that is there has to have been an impact here, and the cases say that when there is an adverse impact the person who is the wrongdoer shouldn't get away with it and the other person shouldn't be kept from being made whole simply because of the difficulty of putting precise financial figures on.

THE COURT: I know that law just as well as anybody else does but there is a lot of difference. The courts exist not to just dream up big fat damage figures to give people, because they want them, and the damage can be $10,000 or it can be 10 million and it makes a lot of difference to the guy who pays it and the guy who receives it.

And I am not going to just dish out money because some executives come in here and say that in their considered judgment they could have sold 750,000 records.

What made the difference? And how good is that judgment?

MR. PRETTYMAN: Your Honor, I hope we have

offered more evidence than that. We have Mr. Lennon's testimony about some specifics in regard to things that didn't happen, we have the testimony here of this gentleman, and we have shown the figures for other albums, and we have shown the projections that were made contemporaneously at the time, not in anticipation of this.

We had the estimates that were made when people called up to find out whether we could make any money out of it.

You make the record sound barren and I think I respectfully disagree.

THE COURT: I think it is barren. It is so ambiguous. This is a difficult case to assign causation.

Now, you know, you start with the idea that -- I don't know if that is the right way to put it -- but one does assume that a big factor in how something sells is the inherent quality of that thing.

Now, inevitably that is part of a mix of the factors that goes in. How did the people hear this album? Word gets around. The kids tell their friends they like it or they don't. The album is there. It is being sold. I mean, at least 300,000 copies are out there being sold. You know, over a period of time.

So it is being reviewed to some extent.

Now, how do you measure, if you were in my shoes, how do you measure the relative impact of that versus snafus in the marketing program, in the effects of being rushed, in the effects of having this, these three or four days of competing TV ads?

Now, you have a number of suggested causes for the sales that ended up, and unlike you, I'm the guy who has to sort the whole thing out and figure out who has proved what.

I can say to you, and I am not trying to say that you should put on a particular point, because that is your business, but I can begin to understand something a little clearer if I know that the trade people depend on certain organized high quality promotional programs.

In other words, if you have got jobbers or retailers or whoever, and if they depend on a high quality, well organized thing, and all of a sudden an album comes out from Capitol and it is all fouled up, they don't have-- I'm screaming to get my T-shirts and I write Capitol and Capitol sends back and says,"Gee, you know, they are still at the wollen mills or something, and I can't get them to you," and they don't come for four weeks, all these guys are writing and they might get pretty sore and they can't get their posters, and if things like

that are happening, that isn't somebody dreaming, those are concrete events.

And that I could understand, if it happened, could create some bad will, it could influence the handling of further albums. All kinds of things.

But those are things that -- and if nothing like that happened, if there was no upset, if there was nothing but a kind of -- from what all these people saw -- a kind of normal situation, maybe there wasn't any problem, and maybe the thing that caused this album to only sell 342 was simply the fact people didn't like it or they didn't have the money to spend because the kids were out of jobs.

That is what I've got to think through.

So the opinion of two or three people from Capitol versus the opinion of two or three people as to the causation, how are you going to choose?

Let me ask you, Mr. Zimmermann, do you know enough of the facts about the promotion to tell me in concrete terms, and not your overall conclusions, what happened on this album? Did the different things that happened -- how did they come about?

A Well, I can't remember all the ingredients of the plan, your Honor. I see about 100 or 110 of these

a year. And I apologize for that.

But the fact that we generally work on the six to eight week cycle and where we can have -- I mean, the day that album is released, every important ingredient is ready to go and in, your Honor, the salesman's hands, so that when he is actually out there selling a new John Lennon album, he can be putting a poster up, setting up a display, maybe he has --

THE COURT: You say salesman, does Capitol have salesmen?

THE WITNESS: Yes, sir.

THE COURT: Who do they visit?

THE WITNESS: They visit both retailers and rack jobbers.

THE COURT: Who are rack jobbers?

THE WITNESS: They are a middle sort of distributor who buys directly from Capitol's distribution and redistribute. They also buy from our competitors.

So that they would actually furnish all the records to a department store or a chain store who only wishes to deal with one point of supply.

THE COURT: So you have got the jobbers and then you have got retailers who are dealt with directly by Capitol?

THE WITNESS: Yes.

THE COURT: And you have got a sales force that services them?

THE WITNESS: Yes, sir.

THE COURT: When a new record comes out, what is the setup that is supposed to exist?

THE WITNESS: Okay. Number one, with the lead time I was speaking, the salesman would, at a minimum a week in front and generally, of an album of this importance, two weeks in advance, visit with the account, describe to him and show him some of the graphcs of the album, like the album jacket, have at his disposal the information from the marketing plan, that he would have a poster or perhaps a mobile that would hang from the ceiling, a T-shirt, whatever ingredients were planned for this particular release.

THE COURT: In other words, he goes to his customer?

THE WITNESS: Yes, sir.

THE COURT: And he tells him what is going to be available.

THE WITNESS: Yes, sir.

THE COURT: And does he at that time have the record so he can give a sample record?

THE WITNESS: Generally not.

THE COURT: No? Is the customer interested in hearing the music or what?

THE WITNESS: On an artist like John Lennon, no, because they expect something, you know, extremely good and he would have normally a positive attitude up to the point of the release of the Rock 'n' Roll album.

THE COURT: When you have these sales figures here, the people that order from Capitol are the people like the retailers or the rack jobbers, right?

THE WITNESS: Yes, sir.

THE COURT: Okay. Now, if you got an artist of John Lennon's stature, do they sort of have an automatic order? Do you understand? Or do they really decide, gee, am I going to order so many of this John Lennon album, but I ordered five times that much for the last album? Or do they just kind of -- is it automatic?

THE WITNESS: I think two things happen. When the salesman walks in and presents them with a new John Lennon album, most of these customers keep inventory control records, whether it be on a computer or a hard record an inventory card sort of a thing. I guess it really isn't all that important.

So they will have a history of the last Lennon album, the one previous to that, and they will know

exactly what they did sell.

The second thing that happens is while the salesman is in there, he has had adequate time to prepare himself to set up some advertising promotions with the customer, maybe some in-store promotions where they will take up a window or a portion of the customer's store to stack records up and make a display with the posters, whatever the other ingredients might be. They may dress the clerks in the John Lennon T-shirts for a period of time as part of the promotion.

THE COURT: Look, suppose you are going into a record store in New York City, to the Capitol salesman. Now, he is telling him about a new John Lennon album, right?

THE WITNESS: Yes.

THE COURT: All right. Now, we talked about the impact of the initial phases. Does a record store order a lot to be sold over, say, six months, or do they tend to order a week's supply? How does this go?

MR. SCHURTMAN: Your Honor, may I approach the bench for a moment with other counsel?

THE COURT: Why?

MR. SCHURTMAN: I have a real problem which I would prefer to discuss off the record for a moment.

THE COURT: All right.

5 pm bsrf 1

(Discussion off the record at the bench.)

THE COURT: We are adjourning now. We have discussed our schedule, which is somewhat difficult because it is difficult to estimate how much more time will be needed, and everybody is badly committed, but we have set 2:00 o'clock Monday, for a session at which time evidence on the amended claim of the plaintiff will be presented --

MR. SCHURTMAN: Plaintiff Big Seven.

THE COURT: Plaintiff Big Seven, and I have suggested to the lawyers that they try to work out some period of two days during the balance of the month of March, except for the 25th and 26th, that they could come back and we could hopefully try to wind up the bulk of this.

But if that is impossible, then we will have to try to find another time. But if you could do your best to do that I would appreciate it.

The other problem is the extent of the proof on the consequence I raised, and I will certainly hear the views of counsel about any -- and heed them very carefully -- about any belief that they may have about me getting too active in the questioning or too active in suggesting, issues or lines of proof, and I don't

bsrf 2

want to let my curiosity make me overstep the proper role of a Judge.

All I can say is that I think that, as we did in the earlier trial, and it seemed to work out pretty well, at each stage we exchanged views and the issues that seemed to be severe, about gaps in the proof or this and that, were taken care of in some reasonably satisfactory way.

I think if during this break the lawyers would think about what should and should not be presented, maybe the issues we were talking about a few minutes ago can resolve themselves in some reasonable way.

All right. We will see most of you on Monday.

(Adjourned to Monday March 22, 1976 at 2:00 p.m.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiffs,

v. 75 Civ 1116

JOHN LENNON, et al.,

Defendants.

- - - - - - - - - - - - - - - - - x

B e f o r e:

HON. THOMAS P. GRIESA,
District Judge

New York, New York
March 30, 1976
11:00 a.m.

APPEARANCES:

WALTER CONSTON SCHURTMAN & GUMPEL, P.C.,
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York
WILLIAM SCHURTMAN, Esq.,
ALAN KANZER, Esq., of counsel

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, Esqs.,
Attorneys for Defendants John Lennon and H. Seider
JAMES M. BERGEN, Esq.,
HOWARD P. ROY, Esq., of counsel

CLEARY, GOTTLIEB, STEEN & HAMILSON, Esqs.,
Attorneys for Defendant Apple Records, Inc.,
GEORGE J. GRUMBACH, JR., Esq.,
JAMES McHUGH, Esq., of counsel

HOGAN & HARTSON, Esqs.,
Attorneys for Defendants Capitol Records
E. BARRETT PRETTYMAN, JR., Esq., of counsel

MR. SCHURTMAN: Your Honor, I am ready to proceed with my cross-examination of Mr. Zimmermann.

MR. PRETTYMAN: I have two matters.

THE COURT: Yes.

MR. PRETTYMAN: A subpoena was served upon Capitol Records during the interim since the last hearing requesting certain week-by-week figures in relation to certain albums.

I have that information and would like to give it to opposing counsel.

It consists of two pages, the second page bringing up to date certain information on the first page.

I would like, if he is going to mark these as an exhibit, or as a matter of fact, whether or not he's going to mark this as an exhibit, that this be treated in the same confidential manner that we have previously provided for other exhibits.

THE COURT: Agreed?

MR. SCHURTMAN: No objection.

THE COURT: Fine.

MR. PRETTYMAN: The other thing, your Honor, is that the last time you raised for the first time an issue in regard to mitigation.

To be honest with you, I have simply not focused

on that because I thought that was so fully explained.

We have done some research and have prepared a brief memorandum in regard to mitigation that I hope would convince you that that is not an issue in the case, and I will hand copies to opposing counsel at the same time that I hand one to your Honor.

THE COURT: Fine.

MR. SCHURTMAN: If your Honor please, you have indicated at the last session that you wanted us to hold off on further briefs until the evidence was in,and we have been doing that.

Do you want me to start submitting briefs on the open issues? I certainly want to respond to whatever he has said about mitigation.

THE COURT: I don't know anything about-- Obviously the issue of mitigation, I think, was raised - - I think Mr. Prettyman is right, I started talking about it, and I certainly need to get informed on the law, and you can answer. We are not going to finish this case the next few days.

MR. PRETTYMAN: I certainly have no objection to that, your Honor.

MR. SCHURTMAN: I'd also like to respond to Mr. Prettyman's last memorandum on the Ali Asca case,

the case of attorney's fees.

THE COURT: All right.

Go ahead with Mr. Zimmermann, then.

D O N Z I M M E R M A N N, having previously been sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Zimmermann, when Capitol released an album with a suggested retail list price of $6.98, what does it normally retail for in the trade?

A It varies. I saw one yesterday, a $6.98 being retailed for $3.66.

It will vary as high as $6.98, which is not --

Q When you say it will vary as high as $6.98, under what circumstances will it be sold at the full retail list price, as suggested by the manufacturer?

A Under what circumstances?

Q Yes.

A That's the dealer's option.

Q Isn't it a fact that in most cases the records are sold at substantially lower prices than the suggested retail price?

A Yes, that's true.

Q Can you give me any idea of the percentage of

cases in which that happens?

A Probably -- I have no way of being factual on the matter, but I would assume over 90% are discount records.

Q Over 90%?

A Yes, at least that.

Q What would the discounted range normally be?

A I think probably on a new album, in the area of $3.99 to $4.29, $4.59. It depends on the part of the country you are in.

Q For example, did you just come out -- when I say you I mean Capitol -- with a new record by another former Beatle, Paul McCartney?

A Yes.

Q That was just released very recently, was it not?

A Yes.

Q What was the title of that record?

A "Wings, The Speed of Sound."

Q In looking through this past Sunday's New York Times Magazine I saw an ad for Paul McCartney and "Wings." It says "The newest release on Capitol, Series $6.98, price $3.69."

I show it to you. I have marked it Plaintiff's Exhibit 225 for identification.

A Yes.

Q First let me ask you this: Does Capitol have anything to do with the placement of advertisements like this?

A We do fund advertising.

Q You share in the cost of such advertising?

A Yes.

Q Do you approve the advertisements?

A No, we do not.

Q Are they submitted to you at all?

A Just for payment. In other words, when any of Capitol's customers runs advertising, where the expenditure is approved by Capitol, it is in the nature of co-operative advertising.

The account actually, for the most part, does the mechanical layout, pricing, all those things.

Q When this advertisement says "Series $6.98" does that refer to the suggested retail list price, the $6.98?

A I'm sure that is a vehicle for Korvette to refer to that.

Q As a matter of fact, you must know that, Mr. Zimmermann, that the ads refer to Series $5.98 and Series $6.98.

A That isn't true all the time. Korvette's happens

to use this, but they are a suggestion.

Q That refers to the suggested retail price?

A I would assume so.

THE COURT: What is the discount price listed there?

MR. SCHURTMAN: $3.69.

Let me offer this in evidence.

THE COURT: Any objection?

MR. PRETTYMAN: I don't see the relevance, but sure, I have no objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 225 received in evidence)

MR. PRETTYMAN: Are you going to offer a series of these? If so, I'd like -- I would like to make an objection.

MR. SCHURTMAN: No. Not on Paul McCartney.

MR. PRETTYMAN: He testified last time at some length about the variances in price at the retail level.

Are you disputing that testimony? I object on the ground of relevance. I don't know what he's trying to show.

BY MR. SCHURTMAN:

Q Mr. Zimmermann, would you say that the advertisement that I have just shown you on the Paul McCartney album

is typical of the manner in which new releases are discounted?

A It is probably typical for New York City. The price varies geographically depending on the competitive position that particular account finds itself at.

Q Would you say the thre $3.69 price is sort of typical of the range of discounted prices?

A I think it's rather low.

Q $3.69 is low?

A Yes.

Q What do you think is the high side of the range?

A As I said before, it could be, for an aggressive retailer in otherparts of the country, it could be as high as $4.79.

Q What is the significance of a suggested retail list price of $.68 if in more than 90% of the cases they sell it at a range of $3.69 to $4.79?

A It's basically a manner of computing discounts.

Q Has the same type of discounting taken place over the last three or four years; in other words, the $6.98 albums have been sold at the range you have indicated?

A I'm sorry, I didn't make myself clear. It is a manner in which virtually all record companies, at least those I know of, compute their wholesale price, the price --

the net price that they sell their customer at.

A $6.98 carries a higher price than a $5.98 and a lower net price than a $7.98.

(continued on next page)

Q Let me ask you this question, Mr. Zimmermann, if in fact a record with a suggested television retail list price of 6.98 will normally sell in the retail trade at discounted prices ranging from 3.69 to 4.79, and if you knew that the price of the Roots album was going to be 4.98, and I believe you have indicated that you did have that knowledge, why was it necessary to cut the suggested retail price from 6.98 to 5.98 in order for Capitol to compete against Roots?

A We were -- when we priced the album we were not aware that the album would be out at 4.98, and I believe when last I testified -- normally a package similar to Roots would be advertised at a price between 3.88 and 4.98.

We didn't know exactly what the price would be until the television advertisement actually did run.

However, there is about 70 percent -- about 70 percent of our business is done through rack jobbers who in turn sell a retailer and make a profit, that 70 percent of the record business isn't only with Capitol, that does not sell records for 3.69. Their price would be more in the area of 4.79 and sometimes even higher.

THE COURT: I don't understand what you said at all. Are you saying that you have decided to -- on the 5.98 price before you knew about Levy's 4.98 price --

THE WITNESS: Yes.

THE COURT: Then what influence -- all right.

BY MR. SCHURTMAN:

Q I don't follow your testimony on the rack jobbers. How does that affect the suggested retail list price?

A Because the rack jobber buys a record at wholesale price, must distribute it and make a profit to a department store, discount store, chain operation, someone who chooses to buy directly from the one source jobbing sort of an operation.

Building in that man's profit and overhead, that outlet pays more for records than a major retailer who if he buys directly from Capitol or from another manufacturer.

Q How much do they retail the records for?

A That's probably primarily 4.79, those prices that come out.

Q With respect to the 4.98 price that was charged for the Roots album on television, let me ask you a couple of questions: Do you know when Capitol first learned that the price would be 4.98?

A To the best of my knowledge it was immediately after the advertisements first ran.

THE COURT: Immediately after what?

THE WITNESS: After the first television commercials were run on television.

Q Did you ask anyone before that?

A No, and I really didn't know who to ask.

Q Did you try asking Mr. Lennon and Mr. Seider?

A No.

Q Did you ask Alan Klein?

A No.

Q Did anyone tell you?

A Pardon me?

Q Did anyone tellyou?

A No.

THE COURT: What was it that caused you to fix the price of your album at 5.98? What was the reason for the 5.98 price?

THE WITNESS: Well, your Honor, we knew that historically television packages of this nature had carried a retail price of between 3.88 and 4.98.

Q Can you name any packages at 3.88?

A I have seen them on television. I just don't recall -- I don't pay that much attention to those things any more.

Q Can you name one?

A Not offhand.

Q The 4.98 price that was charged for television package, for mail order package, does the customer who orders a mail order package ever get a discount on that? In other words, if he sends in his 4.98 plus or minus postage and handling, is he likely to get back a discount check, as far as you know?

A Well, no, but --

Q It is a firm price?

A There was no reason for us to believe that it would be strictly a mail order venture.

Q What did you believe it was going to be?

A We believed that it would probably be sold at retail.

Q Did you have any basis for that belief?

A Adam VIII had had a history of selling albums at retail outlets.

Q Did you check to see whether this particular package was going to be sold at retail?

A There is to my knowledge no particular way of finding that out effectively.

Q Did you check with any of the retailers to see if arrangements had been made to sell the package at retail?

A We received no information of that. However,

much of the confusion and unrest I spoke of before came from that area. In other words, as I mentioned, 70 percent of our business is done through this sub-distribution network. The accounts that they sell directly, department sotres, drugstores, discount houses, are usually the prime vehicle for a television retail package, and that package is sold directly to the retailer, it is not sold through the jobber.

So there, the jobber restricts his purchases because he's a little bit nervous that he's going to kind of get his brains beat in competitively by the actual manufacturer of the television package, Adam VIII in this particular instance.

Q Did you check with a single retail outlet, with a single discount chain to determine whether any arrangements had been made to or even discussed about selling the Adam VIII package through retail?

MR. PRETTYMAN: Your Honor, I object to this because if he had checked he would have found that Mr. Levy was intending to sell it worldwide and through the various channels that he's talking about.

MR. SCHURTMAN: I object to counsel's statement.

THE COURT: Overruled.

A You know. I guess if -- we assumed that it would be sold at the retail based on the history of the Adam VIII operation. They had sold most of their packages retail.

Even if we had not received information to the fact that anybody had been contacted to sell it at retail, that doesn't mean a week later someone couldn't have been approached and we would have been out with a high priced package.

Q Mr. Zimmermann, you keep saying it was your understanding that Adam VIII sells through retail. You mean through regular retail stores?

A Through department stores, people who are in the retail business.

Q Do you know what a retail fulfillment center is in the trade language?

A Yes. A mail order --

Q What is it?

A My understanding of it, it is a mail order fulfillment center.

Q Isn't it a fact that the only time Adam VIII sells through retail, as you put it, is if they advertise it on television and tell the viewer that instead of having to send in a check to the TV station, or whatever post office

box is given, that he can go to a particular location and pick up the album?

A Absolutely.

Q Isn't that the way it works?

A Absolutely. That is not a fulfillment center. The fulfillment center -- semantically, my understanding of a fulfillment center is somebody who receives money in the mail, orders in the mail with money and in turn mails that money out.

Q That is a mail order fulfillment center?

A Yes.

Q What is a retail fulfillment center?

A I would imagine it is some sort of a warehouse that distributes records.

Q You don't know?

A I don't know what you are leading to, no.

Q I see.

So now when you talk about Adam VIII selling through retail stores, you don't really know quite how they do it, do you?

A The mechanics of how they get the reords in the retail stores?

Q Yes.

A No, I don't.

Q Or the arrangements they have with the retail stores, you are not familiar with that, are you?

A No.

Q Do you know at what price they sell in retail stores?

A Well, I think the advertised price is similar to the one on television.

Q That is right. It is the television price.

And do they give discounts when they sell it through the retail stores after advertising it on television?

A I think that is at the option of the retailer. The retailer can set his own price.

THE COURT: Mr. Schurtman, I don't understand the effect. Let's assume that there would be no discount beneath the $4.98 price. Absolutely none. Still,

$4.98 is less than $6.98.

MR. SCHURTMAN: No question about it, but we have had testimony, your Honor, from Mr. Zimmermann, from advertisements and I am prepared to offer him more advertisements that at a 6.98 suggested retail price, the records sell at a maximum of 4.79. That's what the consumer ask to pay. Yet the 4.98 price that Roots was charging could not be discounted. That was 4.98 which the customer had to mail in and, even if it was sold through the retail fulfillment center which it was not, the price would still be 4.98. My question is this: If a 6.98 record sells at a maximum of 4.79 and actually the evidence shows it is closer to 3.69, then why did they have to cut the suggested price from 6.98 to 5.98 in order to compete against Roots? The 6.98 album was priced low enough in the retail trade to undersell Roots, so what are they trying to accomplish? Yet they are coming in here and asking you to give them the differences in damages.

I am trying to figure out why they thought they had to cut the price. Maybe there was a good reason, but I haven't heard it yet.

MR. PRETTYMAN: Is your Honor entertaining argument at this stage because I would like to be heard.

THE COURT: I wanted to just shorten the

proof.

MR. PRETTYMAN: Because I think I mean what he has testified is clearly that since 70 percent of his business is jobbers, that they had to bring it down to 5.98 to make sure.

THE COURT: I don't understand that. I don't understand the jobber thing. The problem I have got is this: I think the evidence would be that the 4.98 I don't have any evidence of discounting the TV package, so, do you know of any discounts or maybe you just don't know, do you know that if these TV packages through companies like Adam VIII would be discounted or don't you?

THE WITNESS: I really don't know, your Honor. All right, so thathas to come if it comes from anybody,

THE COURT: All right. So that has to come if it comes from anybody, it comes from some other witness. Now, when you go into your state of mind at the time, were you one of the people that helped to set the price 4.98?

THE WITNESS: Yes.

THE COURT: Can you explain again to me and part of the problem, I guess,is I haven't reviewed the testimony that we took on the 17th of February, but what are the factors in your mind that led to you recommending, or whatever you did, with respect to a 5.98 price?

THE WITNESS: Okay. We weren't sure of the Adam VIII price. We really had no way of gauging that assurance of what the price would be. So we thought it would because it was customary on television at that point, a package ranging from a low price of 3.88 advertised to 4.98 advertised. We do business with 30 per cent of our accounts who we sell directly to, who are retail record stores.

People such as Korvette's and Sam Goody's, King Karol and there is a group of retailers in almost every major city in the country. 70 percent of our business is done through what we officially call a subdistributor.

THE COURT: Are they the rack jobbers?

THE WITNESS: They are rack jobbers who sell records to department stores, discount houses, outlets of that nature as I mentioned before; they carry Capitol, Columbia, RCA. They carry all labels. They completely service a rack. They have routemen in the field, who merchandise those racks. All the advertising, they offer a full service to this particular chain of stores. And it is primarily because this particular chain just doesn't have their own facility to deal with all the various record companies who have their own distribution, independent distributors, to set up advertising programs, all the things.

So they rely on this one source.

THE COURT: Yes.

THE WITNESS: As a result, the subdistributor or rack jobber,of course, is in business to make a profit. He has his overhead, so he in turn, charges about 25 percent more probably on average for the product in the retail store. Obviously.

THE COURT: More than what?

THE WITNESS: More than the retail store could buy it if he bought directly from the manufacturer.

THE COURT: Well, in order to understand this, what do you typically sell, what is your price to the retail store, like Goody's?

THE WITNESS: 3.36

THE COURT: What is your price to the rack jobbers?

THE WITNESS: The same price.

THE COURT: Now, the rack jobber then, what does he sell that for, to the stores he servides?

THE WITNESS: It would range between probably 4.10 up to 4.25 or .30, your Honor.

THE COURT: Okay. Where does this lead? In otherwords, I start out asking you the factors in setting a 5.98 price, so now, where does this lead?

THE WITNESS: Well, I think it leads to the

fact that the customer who is serviced by the subdistributor or in order for him to make a profit, must sell the record for 4.79, in that area, or higher.

THE COURT: Well, that still is over a dollar -- that is even with the 6.98 price, right?

THE WITNESS: Yes.

THE COURT: And that's less than 4.98?

THE WITNESS: Yes, sir.

THE COURT: I don't know what we are getting at here.

THE WITNESS: In other words, your Honor, as a manufacturer, we cannot suggest a price to our customers. A retail price.

THE COURT: Well --

MR. SCHURTMAN: You suggest it.

THE WITNESS: An effective selling price. We can give a suggested price but all that tells him is what he is paying for it. We cannot go to Korvette's and say "Hey, we would like you to sell this album at this price.

THE COURT: I get your point. You can't impose.

THE WITNESS: We were working not knowing what the price of the Roots album would be, not knowing how our customer would react to knowing just being there, of

Adam VIII being able to go through fulfillment center or any means that they chose, to go directly to even a Korvette who would sell directly I have no idea of what their wholesale prices are, would be somewhat illegal to make an active pursual of that. But I can't, you know, there is no way that we could go through the rack jobber to maybe a Macy's or any other major chain who we do not service directly, and be competitive to our normal distribution.

THE COURT: Look, maybe we covered this last time b[illegible] don't think we did. Now let's take the 5.98 album. What did you sell the 5.98 album for to the retail stores like Goody's?

THE WITNES 2.87, I believe.

THE COURT: Let me get that. And what did you sell to the rack jobbers?

THE WITNESS: Approximately the same price.

THE COURT: Right. Okay. You know what the rack jobbers sold that album to the stores for?

THE WITNESS: I could only estimate using an approximate 25 percent markup.

THE COURT: What would that be?

THE WITNESS: In round figures, about probably $3-1/2.

THE COURT: Adding about 70 cents?

THE COURT: The thing is, I don't want to get into an argument but just, I think the thrust of your question, Mr. Schurtman, was that the difference between the suggested retail price of $6.98 and $5.98 was kind of a theoretical or a nominal difference and not a practical difference.

Now if they sold, I mean if there was a difference in selling price by Capitol to Goody's, and to its rack jobbers, on the $5.98 album versus the $6.98 album, that is not a theoretical difference. That is a difference of some 50 cents. That is not theory.

MR. SCHURTMAN: But my point, Judge, is that even at a $6.98 suggested retail price the album would have sold at less than Roots which was selling at $4.98. And why did they cut the price?

That bears directly on the question of mitigation of damages. They are telling you, Judge, we had to cut the price in order to meet Roots.

THE COURT: At least I got some concrete facts here.

MR. SCHURTMAN: Well, if I may spend two more minutes on that point, I think I can wind it up.

THE COURT: Sure.

BY MR. SCHURTMAN:

Q When you made your decision to cut the suggested retail price from $6.98 to $5.98, who made the ultimate decision? Was it Mr. Menon?

A It was kind of in concert. There were a number of us who discussed it. I think Mr. Menon had the final approval, the go ahead.

Q All right.

Now you testified that Capitol did not know at the time whether the Roots album would sell for $4.98 or $3.98 or any other price?

A Right.

Q You were operating in the dark.

Did you discuss that with Mr. Menon at all?

A Unfortunately Mr. Menon was in New Orleans. We did have a meeting earlier in the week.

Q Well, you were here when Mr. Menon testified the last time.

Let me just read you six lines from his testimony at page 2383 of this trial transcript.

He says, "The primary determinant of the $5.98 price which was a dollar lower than our prevailing, still-prevailing recommended retail price was the fact that the Roots album we had reason to believe was due to be

advertised and offered to the public for sale on television or through television at $4.98."

So apparently Mr. Menon had reason to believe it would be $4.98.

Did he communicate that reason to you?

A I think Mr. Menon knowing that the record Roots album did eventually come out at $4.98 was referring to that but I distinctly remember in a meeting in the beginning, the first week of February, conversing on what we should do to be competitive with the Roots album and at that point Mr. Menon did not know what the advertised price would be or I am sure he would have told us so.

Q That is not what Mr. Menon said.

THE COURT: You can argue from the differences in the text.

A One other thing on that subject. The advertised price that you see on the McCartney album in Sunday's Times or anything else advertised price that is run with any of our customers is usually between four days and seven days' duration. It is not a normal shelf price.

Q I know but it is normally the price that is charged when you have the initial impact period, isn't it?

A When you have advertising and promotion.

THE COURT: The big discounts are at the beginning?

THE WITNESS: Yes.

Q And that is when you expect to make most of your sales, I believe that is what you testified the last time?

A That is when you are getting most of your impact.

Q Right now when you decided to reduce the suggested price from $6.98 to $5.98, did you consider among other factors what Lennon's preceding album had retailed for? What was his preceding album, the one that preceded "Rock and Roll"; do you remember?

A "Walls and Bridges."

Q "Walls and Bridges." And that came out when, September of 1974?

A Yes.

Q Let me show you Plaintiff's Exhibit 226, which is an advertisement in The New York Times of October 6, 1974, where Korvette's is advertising "Walls and Bridges."

It days "Series $6.98." I assume "Walls and Bridges" had a $6.98 suggested price, did it not?

A Yes.

Q And it is selling for $3.88?

A Yes.

Q Does that indicate to you that the range at which $6.98 series was sold on a discount basis was not somewhere in the $4 area but in the $3.88 area?

A Mr. Schurtman, you are talking about one account in a highly competitive major market, who is running that record at $3.88 for a very short period of time. I can assure you that in other areas of the United States, that price would not prevail. It would be a much higher price.

Q Youcan assure me. Do you know what the price would be in other areas of the United States? Can you give --

A I guess it could be as high as $4.79.

Q Could you give me percentages of how many records sell at $3.88 and how many sell at $4.79?

A That would be almost impossible because not every retailer in New York City is selling records at $3.88. It just happens that Korvette is, because they are running an ad. Goody may not have had an ad that week. It would be impossible for me to recall.

Q Don't places like Korvette and Goody's and the other retail stores keep running these discount ads over and over again?

A On different products.

Q On the same product?

THE COURT: What were the initial discounts on the "Rock and Roll"? Can I have Exhibit 110?

MR. SCHURTMAN: May I offer that in evidence,

your Honor?

THE COURT: What are you offering?

MR. SCHURTMAN: This is the "Walls and Bridges" $3.88, Plaintiff's Exhibit 226.

THE COURT: All right. I will receve it.

(Plaintiff's Exhibit 226 received in evidence)

THE COURT: What have we got?

MR. SCHURTMAN: May I proceed, your Honor?

THE COURT: Yes.

MR. SCHURTMAN: I think I have gone about as far as I can on the price question.

Now let me go to the question of loss, the allegedly lost sales.

Q I believe you were here when Mr. Menon testified that during the fiscal year ending June 30, 1975, there was a drop in sales on the part of Capitol because kids didn't have enough money to buy albums -- I am paraphrasing what he said.

A Yes.

Q Do you agree with that?

A Yes, there were economic problems that affected the industry, yes.

THE COURT: About when was that?

MR. SCHURTMAN: That was during the fiscal year

ended June 30, 1975.

A Right, it was probably from October of 1974 through June of 1975.

Q That encompassed the period during which "Rock and Roll" was released?

A Yes.

Q That was released in February of 1975?

A Yes.

Q And did that condition continue to persist after June 30, 1975?

A It seemed to improve on a gradual basis throughout 1975.

Q Well, during the first quarter of the next fiscal year, I am talking of the period from July 1, 1975 to September 30, 1975.

A Yes.

Q Your sales continued to hurt, did they not?

A No, in fact I think we had volumewise, in comparison to our release schedule, a fairly substantial quarter.

Q Let me read to you from the report in Billboard November 1, 1975, which said, and I just want to see if it refreshes your recollection: Capitol posted first quarter earnings of $524,000,16 cents a share on sales of

$33,865,000 for the period ending September 30 compared to earnings of $2,160,000 or 65 cents a share on sales of $34,213,000 for the same period a year ago.

Does that indicate that sales were still less than the preceding year?

A It really indicates that your release schedule during the first quarter of 1975 was not as good as we would have liked it to have been or not as good as the year before.

Also during the prior year, during the same quarter, there was a price increase in which customers bought at the old price to take advantage of the new price which I think went into effect August 1, 1974.

Q When did you have the price increase?

A August 1974, which was in the corresponding quarter of the previous year. And that July was a very substantial volume month due to that.

Q Was that the industrywide price increase from $5.94 to $6.94?

A $5.98 to $6.98. Yes, it happened all within a span of three or four months, yes.

Q Let me ask you one point on that price increase. What were the mechanics that were used with respect to records that were on the market to raise the suggested

retail price, whatever that means, from $5.98 to $6.98?

A What do you mean by "mechanics"? I'm sorry.

Q Well, you had records onthe market at that point?

A Yes.

Q Which had a suggested retail price of $5.98?

A Yes.

Q Correct?

Did you raise the suggested retail price for those records?

A Yes.

Q To $6.98?

A Yes.

Q How did you accomplish that?

A We published a price card, make announcements to the trade and also send out announcements to all our customers, making them aware of the change in suggested retail price and how it affects their net purchases, what their new net price is.

Q And you do that even for records that are already out in the field?

A Only if it is a broad-brush catalog approach. Everything goes up.

Q Getting back to the alleged loss of sales, can you tell the Court what the percentage decline of sales was in the fiscal year ended June 30, 1975, roughly?

A Overall?

Q Overall.

A Around 25%.

THE COURT: Are we talking about unit, in number of records sold?

THE WITNESS: Dollars, your Honor.

THE COURT: Even after the price rise you had the 25% decline in dollar sales?

THE WITNESS: Yes.

Q That was due to the state of the economy?

A Not only the state of the economy, we really

didn't have-- there were a number of factors that contributed, Capitol had been involved with the distribution of something that is commonly referred to as label deals. We had a couple of outside labels which we manufactured and distributed, Invictus, Shelter Island, Apple, which was a product- which I'm speaking -- which was not performed by the Beatles, all that stuff pretty much wound down just prior to that fiscal year,and we -- it took us a while, in fact, up to the current, to really build our artists' roster to replace that lost line.

Q Are you in a position to tell the Court to what extent the sales of "Rock and Roll" were affected by your general 25% drop in sales?

A That would be very difficult to project. When we made our initial projections we were very cognizant of economic conditions, so, therefore, I think any projections we made were in full knowledge of the state of the economy and the state of the marketplace.

Q Did Capital release any singles from "Rock and Roll"?

A Yes, one.

Q Which one?

A "Stand By Me."

Q When did you release that?

A February. Frebruary of 1975.

Q What were the sales on that single?

A I don't recall.

Q When in February did you release it?

A As memory serves me, about a week after the album. I'm not absolutely sure.

Q At what price did you release it?

A What price?

Q Yes.

A It was $1.29, a suggested list.

Q How much did it actually sell for, do you know?

A Probably averages out 96, 98 cents.

THE COURT: One thing I have to remember, the whole testimony about pricing, I think all the references, since we started the evidence on the counterclaims, has been about the record album and not the tape.

Is that intentional or oversight or what?

MR. SCHURTMAN: I think the tape is usually somewhat higher.

THE COURT: Nobody has spoken about the tape, so I am not to worry about the tape, right?

MR. PRETTYMAN: I'll ask a question about it.

THE COURT: All right.

MR. SCHURTMAN: The same thing applies to the

TV ads of Roots, the tape would be higher than the album.

THE COURT: There is just no evidence about it, you see, so I don't know what is going on about the tape.

BY MR. SCHURTMAN:

Q Mr. Zimmermann, do you know whether Capitol --

THE COURT: Keep your voice up, please.

Q Mr. Zimmermann, do you know whether Capitol has ever released any other album by an artist of Mr. Lennon's stature in which this artist recorded not his own material but material that had previously been recorded by other artists?

A I think that's in many cases a very common practice, artists like Glen Campbell, Helen Reddy, continually put otherwise recorded material on their albums, not every album, but it is not a unique practice.

Q Are these albums where the entire material in the album is of what somebody else has previously recorded?

A Generally not. Not the entire album.

Q I asked you a very specific question: Do you know of any instance where Capitol has released an album by a major artist such as John Lennon where he has recorded somebody else's material which has previously been recorded by other people, and where the entire album consisted of such material?

A Yes, one album by The Band, "Moon Dog Matinee."

Q Where The Band recorded material that had been previously recorded by other artists?

A Yes.

Q Would you say The Band is comparable to Mr. Lennon in stature?

A No,but they are artists of great note.

Q How did The Band's album do in relation to its other albums in terms of sales?

A Not quite so well, but I think it's an entirely different reason for it, in our estimation.

Q First answer --

MR. PRETTYMAN: I object. He's in the middle of his answer.

MR. SCHURTMAN: He's giving me a reason. First I'd like the answer. Then if he wants to explain it away, I have no objection to his explaining it.

THE COURT: I didn't know he hadn't finished. Go ahead, Mr. Schurtman.

Q The specific question I asked is whether the sales of that particular album by The Band of other people's material, were less than the sales of other Band albums where they used their own material?

A Yes, it was, but I believe the reason is for --

Q Tell me the reasons.

A -- are that The Band has been historically -- they were the Bob Dylan backup group and were very instrumental in much of Dylan's early work.

Their first several albums were on a pretty predictable release pattern. They did some touring, they were pretty visible.

They went, I believe, before "Moon Dag Maintee," about two to three years with no new product on the marketplace.

We have also just come off of a new album by The Band which didn't do substantially better than "Moon Dog Matinee," even though it did contain original compositions by The Band, and the reason being that they are just not a very visible group in press or appearances or any other form.

Q Is that the only example you can think of, The Band, in response to my earlier question?

A Offhand it is,yes.

Q All right.

Going back to Plaintiff's Exhibit 110, which is a list of Lennon albums since December 1970 --

A Yes.

Q -- is this a list of all albums that Lennon has

put out since he started performing on his own as a -- not as part of The Beatles group?

A As far as I know it is, yes.

Q Didn't he actually put out some earlier albums before December 1970?

MR. PRETTYMAN: I can't hear you.

Q Didn't he put out albums before December 1970?

A I don't think they were of the nature of pop music, though. There was a wedding album which really was not meant to be, you know --

Q But they were albums that he put out, regardless of how you characterize them?

A Yes.

Q Let me show you three albums, Plaintiff's Exhibit 227 for identification, which is the wedding album you have just mentioned, Plaintiff's Exhibit 228 for identification; maybe you can figure out what the title of this is --

A No.

Q Do you know what the title of this album is? Is it John Lennon, Yoko-Ono?

A It was "Unfinished Music No. 2, Live with Lands."

Q Then Plaintiff's Exhibit 229 for identification, Plastic Ono Band.

A Which I mentioned was on the list.

Q Is that the one that is on the list?

A Yes.

Q Are you sure?

A Which was part of a --

THE COURT: What is 229?

MR. SCHURTMAN: That is the Plastic Ono Band--

THE COURT: Can we have the witness testify? Can you read it?

THE WITNESS: Plastic Ono Band, Live Peace in Toronto 1969.

Mr. Schurtman refreshed my memory on something else; this album, which did fairly well, has some compositions which were hits by other artists, which Mr. Lennon did as part of this album.

Q With respect to these three albums, can you tell me what the sales were?

A I don't recall.

Q Do you know why these sales were not included in Plaintiff's Exhibit 110?

A Back in the days when these albums were released, I was in the field, and was not privy to contractual situations between Apple Records and Capitol Records, and I have no idea why these are not on the sheet.

I think it is mainly because they are no longer

in distribution by Capitol Records.

Q Did you prepare Plaintiff's Exhibit 110, the sheet?

A No.

Q Did you have anything to do with its preparation?

A It was shown to me.

Q When you testified on direct, you worked out all sorts of averages where you added up sales and you put in albums and you left out albums.

Can you tell the Court why the sales of these three albums were not included in your averages?

A I'm sure because they were no longer available to our distribution.

MR. PRETTYMAN: Can I ask a question here for clarification?

Are these put out through Capitol?

THE WITNESS: They were Apple records distributed through Capitol.

MR. PRETTYMAN: Capitol's name isn't anywhere on this and EMI's name isn't on it either.

THE WITNESS: We didn't own the matrix on these albums.

Q You did distribute them?

A Yes.

MR. PRETTYMAN: This is manufactured by Zapple.

MR. SCHURTMAN: May I offer these three albums in evidence?

THE COURT: Any objection to 227, 228 and 229?

MR. PRETTYMAN: No.

THE COURT: Received.

xx (Plaintiff's Exhibits 227, 228 and 229 received in evidence)

THE COURT: Where do we go from here?

MR. SCHURTMAN: I have some questions about 110. I'm trying to find a copy for your Honor to follow because the witness has the Court exhibit.

Could I ask one of the defendants' counsel to lend me a copy of 110 to hand to the Court?

THE COURT: The chart about the sales.

MR. SCHURTMAN: Here you are, your Honor (handing).

BY MR. SCHURTMAN:

Q Mr. Zimmermann, at the last session you were questioned about Some Time in New York City, which had sales of only 164,000.

A Yes.

Q And you said, that really shouldn't be included in the averages because it was not a true John Lennon album. There were other artists on it. Who were the other artists?

A His wife, Yoko Ono was on the record and a group by the name of Elephant's Memory.

Q Wasn't his wife Yoko Ono also on some of the other records that you did include?

A I'm really not sure.

Q You don't know. Would you say that most of the material on that album was John Lennon?

A As memory serves me, the majority was, yes.

Q Let me show you Some Time in New York City, which we have marked Plaintiffs' Exhibit 230 for identification. That was put out by Capitol, was it not?

A Yes.

bsbr 2 Zimmermann-cross

Q And most of the material is by John Lennon?

A Yes.

Q And the album did very badly, did it not?

A Yes, it did, and I think primarily because of much of the content in the album that at that point in society, many people found it offensive.

Q People found it offensive?

A Yes.

Q In what respects did they find it offensive?

A Well, I don't know if offensive as much as probably did not understand it properly.

Q Did the fact that --

THE COURT: What character -- what kind of things were on it?

THE WITNESS: The titles were Women is a Nigger of the World, Sisters Love Sisters, there was a tune about Angela Davis. I think the album is a statement. I really can't speak for Mr. Lennon and what, you know, he was accomplishing, but I think at that point there were -- society was in a state of -- on the verge of accepting but not quite there yet.

THE COURT: Accepting what?

THE WITNESS: Statements about women's liberation.

Q This was in June, 1972?

A Yes.

MR. PRETTYMAN: Would you like to see this album?

THE COURT: Yes.

MR. SCHURTMAN: I am going to offer it in evidence, Plaintiffs' Exhibit 230.

MR. PRETTYMAN: No objection.

THE COURT: No objection?

(No response.)

(Plaintiffs' Exhibit 230 was received in evidence.)

Q Would you say that the fact that this album didn't have a very good acceptance by the public, for whatever the reason may have been, did that have an impact on the sales of Lennon's subsequent albums?

A To a degree, yes. In fact, I think looking at the sales sheet, Mind Games was there, and they were back on the right track with Walls and Bridges which showed an increase. They were on an up-curve.

THE COURT: REad the last answer to me, please.

(Read.)

Q But to the extent that there was an adverse impact, how long would that adverse impact continue, would it still affect the sales of Rock and Roll, which was the third

album?

A To a diminishing degree. I think that, you know, as Mind Games was an excellent album and did respectably well, Walls and Bridges did much better, and I think given a full chance, Rock and Roll could have done exceptionally well.

Q You say that Mind Games did -- did you say exceptionally well?

A Respectably well.

Q How do you define respectably well when you compare it with Imagine which sold 1,553,000 and Plastic Ono which sold 702,000?

A I was using your point of reference, actually, which was Some Time in New York City, which was 164,000. It had more than doubled that.

THE COURT: Why did Imagine do so well?

THE WITNESS: It was just a tremendous album, your Honor. I don't know much else to say about it. It was fresh after the Beatles had ceased to record as a group. There was a tremendous acceptance for Beatles' material. It was a tremendous recording. There were no negatives in front of it.

Q Was Imagine an album that consisted solely of Lennon music, Lennon performances?

A I don't know that or not.

MR. SCHURTMAN: Does anyone have a copy of Imagine in the courtroom?

MR. BERGEN: I do, as a matter of fact.

MR. SCHURTMAN: I wonder if we could have it.

MR. BERGEN: May we introduce it as Defendants' CB-5.

THE COURT: Defendants' CB-5 received.

(Defendants' CB-5 was received in evidence.)

THE COURT: Go ahead.

Q Just so we get the record straight on this, Mr. Zimmerman, all of the material on that record is by John Lennon, right?

A It is written by him.

Q Written by him, performed by Lennon?

A I don't see where it says that. It said produced by John and Yoko and Phil Spector.

Q So you don't know offhand, and you can't tell from this, who performed it?

MR. BERGEN: I think all the songs were performed by John Lennon, with accompanying artists.

MR. SCHURTMAN: With the Plastic Ono band and something called the Flux Fiddlers.

Q What is the Plastic Ono bank, by the way, that expression keeps coming up?

A It's a name of Mr. Lennon's band at that time.

Q Have you given all the reasons why in your opinion Imagine did so well?

A I think so.

Q Have you also given me all your reasons why Some Time in New York City did so badly, and why Mind Games and Walls and Bridges didn't get anywhere close to Imagine?

A I think so.

Q Mr. Zimmermann, what are the so-called charts in the record industry?

A The charts?

Q Yes.

A They take many forms, there are national charts which are published in trade magazines and there are local radio station charts.

Q For example, you have charts published in Billboard Magazine?

A Yes.

Q What do these charts indicate?

A They indicate the sales of a particular record in that particular week of its life.

Q Do they show the top 200 records in the country?

A Top 200 albums.

Q Top 200 albums?

THE COURT: That is published where?

MR. SCHURTMAN: Billboard Magazine, a trade magazine.

Q Do records sort of tend to work their way up the charts?

A At varying rates of acceleration.

Q For example, if a record makes the top 20, is that considered an indication that it is a good album?

A Yes.

Q If it makes it to the top twenty, within three or four weeks after being released, is that an indication that it is doing very well during the first three or four weeks?

A In a general sense it is. However, generally albums by a major artist will make the top twenty at some point, you know.

Q Let me refer specifically to Rock and Roll by John Lennon. I show you the charts for the week ending March 15, 1975 from Billboard Magazine.

THE COURT: Week ending what?

MR. SCHURTMAN: Week ending March 15, 1975.

Q That was exactly one month after its release, right?

A Yes.

Q If I read it correctly, it indicates that the record had been on the chart for two weeks, that during the preceding week it had been No. 47 and during the week after that it hit No. 18.

A That is correct.

THE COURT: Whatdo you mean, the week of March 15th, the current week?

MR. SCHURTMAN: The week ending March 15th it was No. 18, the week ending March 8th it was No. 47. It had been listed on the charts for two weeks at that point.

THE COURT: All right.

Q Does that indicate to you, Mr.Zimmerman, based on your experience in the industry, that k and Roll did very well when it was first released?

A No, it indicates that -- these charts are compiled by the actual physical movement of records. As I mentioned before, 70 percent of our business is done through this subdistribution network of rack jobbers. When they report sales they have no idea that -- at that early moment what consumer sales may be, so what they are reflecting is albums they are shipping to their customer.

Q How much of this is based on the rack jobbers' records?

A It is kind of hard to tell. Billboard really doesn't tell who they monitor for this information.

Q You use the Billboard charts in your business?

A Yes.

Q In determining whether your albums are doing well or badly?

A No. We have better barometers than that for determining how well they are doing.

am

Q What are your better barometers?

A The charts are not completely accurate. They are subject to the returns.

THE COURT: What do you mean when you talk about the movement?

THE WITNESS: The charts, your Honor, are based on how many records are shipped to a degree. It is impossible to know exactly who Billboard talks to in compiling the chart. It is a very confidential list of people. Because they want to be able to protect the integrity of the chart as best they can. But a great deal of it has to do with a subdistributor selling records to a retailer.

THE COURT: You are saying it is not accurate?

A There is no, by market research standards, there is no accurate chart in the industry in this country.

Q I will tell you who they claim to talk to and I will read from the chart itself. It says "Compiled from National Retail Stores," which seems to contradict what you have just stated to me.

A Well, I have known for a fact that they subscribe to some of the major rack jobbers and take in their computer runs. And use that in compiling the chart, so, I know that for a fact.

MR. SCHURTMAN: Your Honor, these are photo-

stats of material in Billboard Magazine I would like to offer in evidence as the next exhibit.

MR. PRETTYMAN: You have got the actual sales figures I just gave you this morning.

MR. SCHURTMAN: I am offering it for this purpose, your Honor.

THE COURT: You say he's No. 47,one week is No. 18. Do I have to have all that?

Q Only to show that it is not a figure I made up. It comes from an official --

MR. PRETTYMAN: He has subpoenaed week by week figures from us which I gave him this morning.

MR. SCHURTMAN: Let me mark this for identification if somebody wants to refer to it, it will be available.

THE COURT: All right.

Q Mr. Zimmermann, would it be fair to say, that Rock and Roll did have a strong impact when it was first released, and it wasn't until several weeks after its release when the critical reviews came out and when people had a chance to listen to the record, and to have word of mouth advertising, that sales started to drop?

A I think that the -- I don't know that that is a fact. I really don't. You say didn't. I am sorry.

You were coughing.

Q Could you read it back. I want to make sure it came in right.

(Read.)

Q I think that the reason that the curve was probably initially so strong is because that is pretty normal in our business. One of our problems was that we were unable to ship initially quantities that we had in the previous relase Walls and Bridges because of a tremendous amount of confusion not only with our customer but our salesmen and we tend to deal with impact in our business.

Q What do you mean --

THE COURT: Well, I don't understand what they mean by strong curves. It is all very vague.

MR. SCHURTMAN: That is what I was trying to bring out throughout the charts.

Q Mr. Zimmermann, if a record makes the top 20 in the charts, regardless of how the charts are compiled, within the first four weeks, is that at least an indication that the record was selling very well during the first four weeks?

MR.PRETTYMAN: Your Honor, I object. He has answered and explained that. He has the exact figures in front of him.

THE COURT: No, but we haven't gotten anything approaching specifics.

MR. PRETTYMAN: That is what I am saying he has it right in front of him. I gave it to him this morning.

MR. SCHURTMAN: I am going into that next.

MR. PRETTYMAN: He asked for them. He subpoenaed them.

THE COURT: Let's take a short break. We will be back.

(Recess.)

Q Mr. Zimmermann, let me accept your counsel's suggestion and ask you to look at the actual sales figures of rock and roll. I show you Plaintiffs' Exhibit 232 for identification, which I gather was prepared by Capitol. Are those the sales figures of Rock and Roll by week or by month, I should say?

A They appear to be, yes.

Q All right.

Now directing your attention to the date, well --

THE COURT: Is this something that will get into evidence?

MR. SCHURTMAN: Let me offer it in evidence then I can hand it to your Honor. This was produced by Capitol.

THE COURT: Any objection?

MR. PRETTYMAN: I thought you were going to show me the weekly figures I gave you today.

THE COURT: What is 232, monthly?

MR. SCHURTMAN: 232 is monthly.

THE COURT: No objection to that?

MR. PRETTYMAN: No, sir.

THE COURT: All right. Let us get this -- can we get it tagged.

THE COURT: All right, 232 is received.

Q And then Plaintiffs' Exhibit 233 are the weekly figures, notonly for Rock and Roll but also for Shaved Fish, Walls and Bridges, Mind Games, Some Time in New York City, Imagine, Plastic Ono Bank. These were just furnished to me by Mr. Prettyman. I offer them in evidence.

MR. PRETTYMAN: YourHonor, may these come in, both 232 and 233 under the same restrictions that we have imposed as before?

THE COURT:Yes, of course.

MR. SCHURTMAN: No objection.

THE COURT: 233 is received.

Before we go any farther let me understand what these show.

MR. SCHURTMAN: I ask the witness to explain

them.

THE COURT: Why don't you -- so we keep the thing in order you keep the original exhibits and I will keep the copies.

Now, what does 232 show?

Q Tell the Court what 232 represents.

A It shows sales of Rock and Role through on the first line February 28th, and thereafter by the week.

THE COURT: Now--

A I'm sorry, by the month.

THE COURT: Day net returns and so forth. What does all this mean?

THE WITNESS: The day is the daily gross shipments, the net is the cumulative.

THE COURT: Just a second.

All right. Now net is what?

THE WITNESS: The cumulative net sale.

THE COURT: Now the returns?

THE WITNESS: Are also cumulative.

THE COURT: The returns would have occurred during what time period?

THE WITNESS: From it appears our first returns started to come back in, well, that's kind of hard to say.

THE COURT: In other words, the returns that

would have occurred by February 28th?

THE WITNESS: Yes, sir.

THE COURT: Or by the original dates shown in the exhibit.

Okay now, what does 233 show?

MR. SCHURTMAN: Your Honor, before we leave 232, I think there is a typographical error in it. Mr. Prettyman would concede that the 275 which is handwritten on the bottom should probably be 276.

MR. PRETTYMAN: Yes.

MR. SCHURTMAN: May we change that on the exhibit, your Honor?

THE COURT: Sure. All right.

Now, Mr. Zimmermann, could you respond to the Court's last question on 233?

THE WITNESS: This is a 13-week sales and returns on all John Lennon releases.

Q That shows sales and returns for the first 13 weeks of each album?

A Of each album, yes.

Q Now --

MR. PRETTYMAN: Do you want to ask about the second page?

Q There is a second page attached to it.

A Yes, a supplement on Shaved Fish which is an update taking us through March 26th.

Q I see. Well, let me get that point out of the way first. If you look at Plaintiffs' Exhibit 110, which is the chart of album sales, it shows that Shaved Fish had net sales through February '76 of 456,000. Are you now reducing that figure?

A To 408,128.

Q Okay.

And you still don't have all the returns in on Shaved Fish, do you?

A No, we don't predict a -- it is almost impossible to predict what the returns will eventually be.

THE COURT: All right, now, it is revised to 408,000 as of what date, the 26th of March?

THE WITNESS: Yes, your Honor.

THE COURT:Okay.

Q Now, looking at Plaintiffs' Exhibits 232 and 233, does that indicate to you that sales and deliveries of Rock and Roll were very heavy during the first three or four weeks?

A Yes. That was our sales to our customers not necessarily --

Q Well, you had testified a moment before the

recess, if I understood you correctly, that you were having problems making adequate deliveries?

A That's true.

Q Doesn't this indicate that you managed to deliver a net of 324,871 albums?

A Yes.

Q Before the end of February?

A Yes.

Q Well, where does that indicate problems of deliveries?

A Generally, your sale on an album should be somewhat relative to the resulting sale on the previous release which was Walls and Bridges and it sold significantly better.

Q Let us look at Walls and Bridges. Walls and Bridges according to Plaintiffs' Exhibit 233, during the first four weeks, you had 16,464 the first week, as compared to Rock and Roll which had a lot more. Can you explain that to the Court? I mean Rock and Role had 183,000 the first week Walls and Bridges had 16,000 and yet you have been telling the Court you were in such a rush you couldn't make deliveries.

A Look at the first three weeks Walls and Bridges which are the effective selling period.

Q First tell me about the first week, Mr. Zimmermann?

A The first week could have been one day in duration. I dont recall. I don't have a calendar here to recall what day 9-20 was, but that was the effective release date. 16,000 would be the first full five working day sale.

Q All right. Let us compare the first two weeks. Now for Walls and Bridges, you have got 16,000 in the first week, 208,000 in the second week.

A Right.

Q For Rock and Roll you have got 183,000 the first week, 85,000 in the second week. Now which do you think was doing better?

A As I said, the 16,000 could have have been a full five day shipping.

Q I am not talking about the two-week period.

THE COURT: Well, let's see, it is about 225,000 for Walls and Bridges the first two weeks. right?

MR.SCHURTMAN: 260,000 for Rock and Roll the first two weeks.

THE COURT: Well, 207,000?

MR. SCHURTMAN: 270,000.

Q Now, Mr. Zimmermann, let me ask you this. You testified and Mr. Menon testified at the last session,

that it was terribly important to do everything right during the first few days after the release, because that when you have your major impact?

A Right.

Q You also testified a few moments ago before the recess, that you were having trouble making deliveries during the first few days on Rock and Roll. I have now shown you the figures which have been produced by your counsel. Do you change your testimony on these two points?

A We were having trouble making figures because as I said before, you expect a great deal out of an album like Rock and Roll when it sold an album that sold 600,000 units in a period of time like Walls and Bridges. Your impact should be much greater. You are also affected as I said before, with some basic marketing problems in not having adequate support for the albums.

THE COURT: These generalizations don't help me. Now, he has asked you did you claim that because of production problems or whatever, you were unable to get out enough albums, physically unable to get out enough albums or as many albums as you would have wanted to do in the first couple of weeks or so, is that one of Capitol's claims?

THE WITNESS: No, your Honor, we did not have a physical production problem.

THE COURT: All right.

Well, what is it that -- I don't know what you have been talking about, I mean you say he testified about an inability to get them out? I don't recall that.

(Continued on next page.)

MR. SCHURTMAN: Your Honor, they told you that because of this alleged rush which we caused. They couldn't have a significant, sufficiently significant sales impact during the first week.

THE COURT: Well, that is different from an inability to get them out, which I thought is what you were talking about.

MR. SCHURTMAN: Well, that was a minor point which was brought up only because the witness made the point just before you left the room --

THE COURT: All right.

MR. SCHURTMAN:--where he said -- we have trouble making deliveries. Apparently he didn't mean it that way.

THE WITNESS: No, I didn't.

MR. SCHURTMAN: I just wanted to clarify that point but now let me get back to the main point.

Q You testified at the last session, and Mr. Menon testified at the last session that because of this alleged rush, which was allegedly caused by the Roots album competition, you couldn't make a sufficiently major sales impact during the first few days after the release, and that is when the sales impact has to take place in order to make an album successful.

I think I am accurately paraphrasing what you

and Mr. Menon said.

Now I am showing you the actual sales figures and I ask you to explain to the Court how these sales figures support your theory, if you can.

A I think that we also testified that the ingredients that go into the total marketing plan, where on an ad hoc rush basis and where -- they were spread out over a period of time, did not properly support the sell-through of the album.

We had anticipated an easier time or should have been able to have an easier time in getting more albums at the point of sale supported by the necessary ingredients.

Q Mr. Zimmermann, let me focus your attention on the first two weeks of sales, as shown by your own charts.

THE COURT: Look, Mr. Schurtman --

MR. SCHURTMAN: Well, the witness is not answering my question, your Honor.

THE COURT: I just don't know that we are somehow understanding each other. Maybe you have a better memory of the record than I do, but I don't know that he has ever said that the first few days of actual sales had a particular significance or the first two weeks or the first month.

Certainly in my mind now, I don't know what -- I don't know that one particular period of time is any more significant than another period of time as far as actual sales figures.

I think the witness ought to explain it unless it is already in the record and you have the record and you have pointed out to me if it is.

MR. PRETTYMAN: I think the record also ought to be clarified, your Honor, in terms of the word "sales," because these are shipments which of course can be -- you can ship a lot one day and have an awful lot come back the next so it isn't as if it is sales to a consumer.

MR. SCHURTMAN: Your Honor, let me, if I may, remind you of Mr. Menon's testimony at page 2553.

Mr. Prettyman asked Mr. Menon on redirect:

"Q Mr. Menon, when is the chief principal impact of an album on the market in terms of time from its moment of release? When is its largest selling period?"

Mr. Menon answered:

"A Immediately upon release."

I then asked him on recross:

"Q May I ask what you mean by "immediately" in terms of days, weeks, months?"

Mr. Menon's answer:

"A I mean the day it hits the marketplace.

"Q So you released it on the 13th, or was it the 13th or the 16th-- the 13th I think was the date yesterday.

"The Court: Mr. Prettyman said that there were substantial numbers released on the 13th."

And then I questioned him again on cross.

"Q Just tell the Court what you mean by 'immediate.' How many days or weeks following the 13th would you regard as encompassed within your definition of 'immediate'?

"A If we are able to ship the initial order for release, which we try and do all in the same day, then it would be on that day."

MR. PRETTYMAN: Your Honor, I think it is clear, if you will read Mr. Menon's testimony in its entirety concerning this point that what he was talking about was the essential nature of having your full advertising and other impact coincide with your shipments.

In other words, you hit the market on a particular day and you have everything there including your advertising and everything else.

I don't think he meant -- I didn't take him to mean that you have all of your actual sales on the first day out on the market. That doesn't make any sense.

MR. SCHURTMAN: I didn't think it made sense when Mr. Menon said it.

MR. PRETTYMAN: I am sure he didn't understand it.

MR. SCHURTMAN: I tried to get him to change it on cross and he wouldn't. But the point is, and I can drag in other examples from the trial transcript, your Honor.

THE COURT: He did say when is its largest selling period. I don't know what that would mean and I am perfectly happy to have it clarified because I want to get things clarified but he did say and, Mr. Schurtman, I read plain English, "when is its largest selling period?"

And the answer was:

"A Immediately upon release."

You are asking him the questions.

MR. PRETTYMAN: Well, your Honor, I can only tell you, we had a sheet of sales figures that show that, you know, which he was fully familiar with, which showed that you don't have your largest impact the first day it comes out and I just know that he didn't mean to testify as to that.

This line of questioning, if you will recall, was centered around the fact that instead of having everything come due on one day, because of the confusion with Roots,

things were scattered out and I will have more to redirect in regard to that from Mr. Zimmermann that on the impact dates things were happening and were spread out over a period, so that you have the album going into a store when you don't have sufficient backup behind it, you don't have the supporting material.

THE COURT: Well, I am afraid that this was the case with Mr. Menon. Mr. Menon is the chief executive, and I think-- let's not just dwell forever on Mr. Menon's testimony. His testimony is here.

Let's ask this witness for his knowledge and maybe he has a different version or a clearer or more detailed version.

MR. SCHURTMAN: That is what I was asking the witness.

THE COURT: All right.

BY MR. SCHURTMAN:

Q In other words, Mr. Zimmermann, getting back to this alleged rush, and,you know, that is my shorthand expression for the rush that was allegedly caused by the Roots album and so on, is it your contention that the sales of "Rock and Roll" were damaged during the first few weeks?

A Yes. When I speak of sales, Mr. Schurtman, I

really speak of consumer sales which I don't think Mr. Menon had in mind.

Q We don't know what Mr. Menon had in mind since he is no longer here to explain his mind.

But what are these sales figures that your counsel has handed me that we have marked as 233 and 232?

A Well, we were put under a tremendous amount of pressure because of --

Q No, answer my last question first.

A I am attempting to -- I think perhaps I am.

Q I'm sorry.

A We were put under a tremendous amount of pressure to put the album out in the shortest period of time and also a tremendous amount of pressure to get as many records available at retail and to our sub-distributor customers in order to have full distribution. We worked entirely over a weekend. Everything was on a competely rush basis and our main problem was getting the support backup there in time. We had the records.

Q I know, but how did it have an adverse impact on your sales?

A PUtting that many records out? I don't understand that, sir.

THE COURT: The lack of the backup.

A Because there is a lot that goes into selling a record: the merchandising material, the advertising campaign,your promotion men, having records to promote before release, which in this case they did not have.

THE COURT: Can I make a suggestion? I have a feeling that we are just going to go around and round until we get the witness' detailed testimony, if he has any about actually what he claims was lacking in the backup, when it was lacking, what the lack consisted of, and then, it seems to me that you are in a position to grapple with something concrete.

Now, until then, he is making a general statement and you are saying, well, how do you explain any problem when you have got all these sales of "Rock and Roll"?

Well, we can go round and round with that as we have been for the last few minutes.

MR. SCHURTMAN: I agree, your Honor, that the witness hasn't been specific on lack of backup.

THE COURT: He hasn't been asked by you.

MR. SCHURTMAN: I don't have to ask him. If he puts in a general statement, I don't have to clarify.

THE COURT: I am not disagreeing with you a bit, but as long as his statement is general, he -- your cross-examination of him can't be much more than it is now.

He is just saying that if he had had this backup you would have done better, at least, but we had these problems.

MR. SCHURTMAN: May I just put the question in this form?

THE COURT: All right.

Q Assume for the sake of argument, and I am not conceding anything, that you did have to rush the album, that you did have a lack of backup, that you did not do all the things you wouldhave liked to do within the time you did; assume all that. Now, based on that assumption, can you tell the Court by looking at the actual sales figures, how your sales were hurt, in comparison to "Walls and Bridges"?

A Mr. Schurtman, there is the Capitol organization that has the ability to sell tremendous numbers of records and tapes. Turning to the consumer to buy that is a different matter entirely.

Q Well, are these figures consumer sales?

A They are not indicative of consumer sales because there aren't enough cash registers in the United States of America to sell 183 albums in one week.

Q Are you telling me that all the figures that Capitol has been supplying us in this trial are not consumer

sales,that they are simply your internal back and forth shuttlings?

A No, no, not internal. These are sales to customers who are dealers and subdistributors.

Q So at this point we don't know what consumer sales have been, do we?

A We have a pretty good idea that they have been in the neighborhood of $420,000.

MR. SCHURTMAN: Your Honor, I address this questionto the Court.

THE WITNESS: I'm sorry, that was through--

THE COURT: Now look, Mr. Schurtman, Capitol is not suing for the alleged loss of profits by Bullock's-Wilshire. It is suring for the alleged loss of profits to Capitol. And it is natural that Capitol would come in with its sales figures.

MR. SCHURTMAN: And those are the ones I am using.

THE COURT: OK.

MR. SCHURTMAN: But now the witness tells me they are not relevant.

MR. PRETTYMAN: Your Honor, I object to this. We have had it explained to us that Capitol doesn't have any control or figures on the precise sale at the retail

level. It sells these things to its customers and it does it on a basis where the customer then can return whatever he wants to, so those are the figures we have.

THE COURT: I think Mr. Schurtman has a point in this. And I won't attempt to reconstruct the testimony over the last 15 minutes or half hour or whatever. But I think beginning now, we don't want people,anybody, whether it is me or you or Mr. Schurtman or Mr. Prettyman, let's keep in mind what we are talking about.

Now, if we are talking about Capitol's sales to its customer,that,is the rack jobbers, and the big stores, OK. Let's keep in mind that that is what we are talking about and let's talk about it. And keep in mind that if we are talking about problems, we are talking about problems that affected Capitol's sales to its customers.

Now I am not saying you did shift your ground, but if there was any of that, let's not, unless we have got a good reason to start talking about consumer sales, because that really isn't a problem, unless it relates to Capitol sales and obviously, if the consumer sales are doing very badly, or doing very well, I guess it would influence the amount of records that Capitol's customers would be willing to buy from Capitol. But at least for purposes of discussing, we don't want to kind of continually mix up the two things.

MR. PRETTYMAN: Your Honor, while I completely agree with what you said, may I just point out that I think the exhibits speak for themselves when they show in one column Sales and in another Returns, because the consumer doesn't return the album.

MR. SCHURTMAN: Then I get back to my problem.

THE COURT: All right.

BY MR. SCHURTMAN:

Q Do Capitol's customers have a return privilege?

A Yes.

Q They can return the unsold albums, can't they?

A Yes.

Q They in effect take them on consignment?

A No. They can exchange them.

Q Is the return privilege, as a practical matter, absolute?

A In most cases, yes.

Q Do they are not stuck with inventories of unsold records?

A No.

Q Capitol has to absorb them?

A Yes.

Q So Capitol is concerned about the ultimate consumer sales, is it not?

Q When you talk about the problems in your initial marketing impact, because of the alleged return, are you talking about problems vis-a-vis Capitol's customers or vis-a-vis the ultimate consumer?

A I think you really have to talk about both, and I can only be rational in my statement in that, you know, I can't talk directly to consumers.

I do know that there was a great deal of apprehension, a great deal of confusion, at our customer level and at our own field level.

How that affected us I have to assume was rather substantial in terms of the cooperation and the overall feeling towards this particular piece of product, because no one knew what the ultimate would be that would happen, with the television venture,whether it would appear at retail, whther it wouldn't, whether it would stay on TV, whether it wouldn't.

There were just a lot of questions that weren't answered -- weren't answerable.

Q You are telling me there was confusion on both levels?

A Yes.

Q Is it your contention that the confusion hurt your sales during the initial two or three weeks on the

customer level?

A I think it did to the point that we were unable to maximize our effort because of the support necessary to do so, because of the rush in putting the record out.

Q Let's get specific on the customer level and then later we will get to the consumer level.

On the customer level can you show the Court by referring to Exhibits 232 and 233, how you were hurt during the first three weeks at the customer level?

MR. PRETTYMAN: I don't understand the question. You mean the difference between what he would have sold and what he did sell?

THE COURT: I think it is a perfectly plain question.

MR. PRETTYMAN: All right.

THE COURT: In whatever way he wants to explain it.

A I think it is difficult to assess the degree, but I do know that irrespective of how many records we were able to sell initially, not having the proper ingredients which our customers are accustomed to receiving, plus a lot of the confusion and things which we currently seemed to refer to, we did lose a nettage, there is no question in my mind, from our standpoint, our customer standpoint.

Our promotion men didn't have the records to take to the radio stations until after our customers did.

Q Look at the figures and tell the Court with relation to these specific figures, can you show any adverse impact?

A Not during the first two weeks, no.

Q First three weeks?

A The first two weeks are almost one selling period inboth--

THE COURT: Can you speak a little slower?

THE WITNESS: The first two weeks as shown on this chart, the 14th I believe was a Wednesday or a Thursday, on "Walls and Bridges"; the 20th was a Friday. I'm sure those 16,000 were either shipped out early in error or to a customer where it takes three days to get records to, so the effective first week's sales on "Walls and Bridges" was the week of the 27th, in which we sold over 280,000, if you throw in the 16, you are at 225, 226,000 records.

There was more pressure put on "Rock and Roll" in the first two weeks because of the mass confusion and the impending television promotion which we knew very little about except that indeed it was going to happen.

Q The figures show that in the first two weeks

you sold 50,000 more of "Rock and Roll" to your customers than "Walls and Bridges."

A That is the pressure put on our sales organization to do exactly that, but if you look at the third week --

THE COURT: Wait a minute. When you talked about the pressure, I thought you meant -- what have you been referring to when you have talked about pressure?

I guess I don't understand.

THE WITNESS: I think, your Honor, probably in two areas: The pressure that we felt because of the Adam VIII package--

THE COURT: The pressure was exerted by Capitol on its sales force to move fast and aggressively?

THE WITNESS: That was the second level of pressure.

THE COURT: What do you mean "second level"?

THE WITNESS: The initial pressure was the one that we felt corporately, I guess, that determined what price we should set, determined how quickly we must move.

THE COURT: And that translated, in your view, into pressure by Capitol on its sales force?

THE WITNESS: Yes.

THE COURT: And that you believe had resulted in that initial burst of sales of about 270,000 in the first two weeks?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

BY MR. SCHURTMAN:

Q Continue, please.

A In the third week that -- the Rock and Roll album sold -- which is essentially the second week, sold 56,600 copies, and Walls and Bridges in the third week on this piece of paper, which is effectively the second week, essentially, sold 132,000.

THE COURT: I don't understand that.

THE WITNESS: It was more of a normal --

THE COURT: Let's just call -- for purposes of discussion, let's lump together the first two weeks, couldn't we, isn't that comparable, the first two weeks of Walls and Bridges and the first two weeks of Rock and Roll, would those be reasonably comparable?

THE WITNESS: I think so.

THE COURT: All right.

Then we will talk about the third week, the third week for Walls and Bridges was 132,000, right.

THE WITNESS: Lumping the first two weeks together, your Honor, that becomes the second week --

THE COURT: Just for semantics. Lump the first two weeks together, but they are still two weeks

THE WITNESS: Yes, sir.

THE COURT: We are not calling them one week. We have a thir week, so we don't -- so we know what we are talking about, the third week, which we will call the third week, is 132,000 for Walls and Bridges, right?

THE WITNESS: Yes.

THE COURT: And 56,000, about 57,000 for Rock and Roll, right?

THE WITNESS: Yes.

THE COURT: What do you say about that?

THE WITNESS: Obviously, because of the pressure we triggered on our sales force the first two weeks, and going into the third, there was a large pipeline felt.

Q A what?

THE COURT: On what?

THE WITNESS: There were records sold to our customers, not necessarily -- we have no idea what the consumer purchases were at that point.

THE COURT: Just on your sales, Capitol's sales to its customers, how do you compare 132,000 third week Walls and Bridges with the 56,600 third week Rock and Roll?

THE WITNESS: I would say --

THE COURT: Are you trying to give me any explanation or aren't you?

THE WITNESS: I think as a result, your Honor, of a normal sort of planning on Walls and Bridges, and a step-by-step merchandising, advertising, promotional effort, we were able to effectively hit the consumer with impact, which gave us long term sales benefit.

Q So far you have been using Walls and Bridges as a point of reference. Move over one column to the right to Mind Games. Mind Games you see the reverse pattern from Walsl and Bridges, you see that in the first week you sold 329,000, very heavy sales, just as in the case of Rock and Roll, the second week there were still heavy sales, the third week not heavy sales. Which is your normal pattern, you have Walls and Bridges one way, Mind Games the other way.

A After the first week though, Mr. Schurtman, the first two weeks, you can see there is a consistency, right on through the end of December, which is post-Christmas, and another thing I think that would only be fair to bring

out, something that slipped my mind until I looked at these actual dates, Walls and Bridges was released on the 20th of the month. Capitol's billing to its customers changes on the 26th and every month on every release it always happens, a customer will usually put in their heavy orders when the billing changes because it gives them an extra thirty days to pay for the product. In the case of Mind Games it was released early in the month. So therefore, billing had just changed and there wasn't that sort of a pressure.

THE COURT: Let's take our noon recess until 2:15, please.

MR. PRETTYMAN: Your Honor, is there any possibility at all of taking a little shorter lunch today? You are aware of my problems.

THE COURT: All right. 2 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

MR. PRETTYMAN: Your Honor, we have proceeded sufficiently informally, that I hope you won't mind my making this suggestion in terms of economy of time. Obviously as a result of the questions of both yourself and Mr. Schurtman at our last meeting, we did obtain some additional and more detailed information.

It did occur to me that if Mr. Schurtman had no objection, I might interrupt cross examination to do my redirect so that when he resumes his cross, he would have the full picture in front of him and it might save a good deal of time. Obviously if he has any objection, I won't do it, but I just thought I make that offer, because I think it might cut down a great deal --

THE COURT: What about that?

MR. SCHURTMAN: I don't object to it. Could I ask the witness to clarify to one point?

THE COURT: I think that is a good suggestion. I think it will help Mr. Schurtman.

D O N Z I M M E R M A N N, resumed.

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q The only point I would like you to clarify for me and it is just a question of information is Plaintiffs' Exhibit 110 where the catalog's number of the various Lennon albums are listed.

A Yes.

Q What do the prefixes stand for, the SW and SK and SVBB?

A At one point in time, many, many years ago, actually before the release of these particular albums, the W was a $4.98 album. SW and ST being a cheaper album, SW being a dollar more album. We don't deal in that anymore and haven't for five or six years or longer than that. SW is a single album, with no fancy package particularly. The SVBB because of the double B is a two record set.

Q And what is SK?

A The SK denotes the 5.98 album.

Q I see.

A And the 6.98 tape.

MR. SCHURTMAN: Okay.

Mr. Prettyman, it's all yours.

REDIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Zimmermann, youwill recall that at our last session, you referred to a marketing plan.

A Yes, sir.

Q And it was your impression, I believe, that a marketing plan had been taken to Mr. Lennon on January 28th.

A Yes.

Q Have you checked on that fact?

A Yes, I have.

Q And can you tell us the result of your check?

A In talking to the people who were present at the meting, primarily Mr. Roy Kohara, who was and is our art director, there was no actual marketing plan presented. There were -- the meeting was primarily to decide on a cover for the Rock and Roll album. There was nothing that he could recall that was in the form of a marketing plan. There was discussion with Mr. Lennon at that meeting regarding some of the ingredients thatwould be put forth in a marketing plan.

Q Now, when you are referring to a marketing plan now you are referring to a written marketing plan?

A Yes.

Q You are not saying that a marketing plan might not have been presented orally?

A Oh, entirely possible.

Q When you say "marketing plan," you mean something written down?

A Written down and approved by the marketing head who at that time was myself.

Q All right.

Can you tell us what was the first time that a written marketing plan was prepared for Rock and Roll if such a marketing plan was repaired?

A It was prepared and I believe it was February 11th.

MR. PRETTYMAN: If I can mark this, please.

(Defendants' Exhibit CW was marked for identification.)

Q Now, I show you what has been marked Exhibit CW for identification and ask you, this is Defendants' Exhibit CW and ask you to turn to the third page of that exhibit.

Is that the marketing plan to which you just referred?

A Yes, it is.

Q And to your knowledge, is that the first written marketing plan that was prepared?

A Yes, it is.

Q Now, would you turn to the first two pages and tell us not in detail, yet, but just what these first two pages are?

A As a result of our last meeting, we instructed responsible people in the corporate headquarters in Hollywood to reserve the actual dates the ingredients mentioned in the marketing plan were ordered and the date of arrival in terms of the various point of purchase components, when they did arrive in our Los Angeles distribution center.

MR. PRETTYMAN: Perhaps I will offer this first, your Honor, and then go down these items on by one and ask him to explain what they are.

THE COURT: All right. Let's show this to Mr. Schurtman.

MR. PRETTYMAN: I did.

MR. SCHURTMAN: What are you offering at this point?

MR. PRETTYMAN: These three pages.

MR. SCHURTMAN: They are not part of the same document, are they?

MR.PRETTYMAN: No. If you want to mark them two different things I would be happy to.

MR. SCHURTMAN: Would you mark them for identification separately because one was prepared in

February of '75 and one was prepared in the last few days.

MR. PRETTYMAN: Happy to.

THE COURT: All right. Let us revise the marking now. The marking --

MR. PRETTYMAN: The February 11, 1975 marketing plan will now be --

THE COURT: CW and then the originals will be later exhibits.

MR. PRETTYMAN: CX.

MR. SCHURTMAN: Can I ask the witness a question on voir dire?

THE COURT: We have got two exhibits, CW and CX.

MR. PRETTYMAN: Yes, sir?

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q With respect to CW, which is the so-called marketing plan, was this prepared by Mr. Kileen?

A Yes, it was.

Q Do you know whether he prepared it on the basis of the approval that Mr. Lennon had given on January 28th?

A No, I do not.

Q Do you have any knowledge regarding the circumstances of the preparation of this plan?

A I do know that when this plan was prepared, we were in full knowledge of the Adam VIII package, the Roots package.

MR. PRETTYMAN: May I, perhaps it might help Mr. Schurtman if I were to say that I am not offering this plan as evidence of what was presented to Mr. Lennon. I am offering it solely for what it is, namely, a plan prepared in the light of the competing Roots album.

MR. SCHURTMAN: I object on two grounds, your Honor. This is not the plan that was approved by Mr. Lennon. And secondly, we have been trying to get their advertising plan ever since discovery started in this case, and we have always been told there is nothing available. Now I am suddenly presented with this sheet of paper.

THE COURT: May I see it?

MR. PRETTYMAN: On the first point, as I think I just got through saying, I am not offering it as having anything to do with what we presented to Mr. Lennon, because we have had testimony about that and apparently it develops that nothing written was presented.

On the second point, I have no explanation to give you whatever for the late production of this, other than what I have said to you before when I thought that it turned out that there was in the testimony, that there was a

written plan presented to Mr. Lennon and you recall, I said then, that I spent three days out there, we looked for these plans, I never saw any such plan. Well, it now turns out that the reason I didn't find it was that there wasn't any such plan but as to the reason, if I may just finish, but as to the reason why this is found late.

THE COURT: You mean CW?

MR. PRETTYMAN: CW is found late. I have no explanation except for the fact that it obviously was not done purposely. We have a tremendous organization out there. I did my very best to find every sheet of paper that could possibly be called for, and we came up as Mr. Schurtman does, with a tremendous amount of material, but this did not turn up.

MR. SCHURTMAN: All right. I won't push the lack of discovery objection. I accept Mr. Prettyman's explanation. But I do object to its relevancy.

THE COURT: I will overrule that. Objection overruled. I will receive CW.

(Defendants' Exhibit CW was received in evidence.)

BY MR. PRETTYMAN:

Q Now, on CX, why don't I, before offering that, go through and have him explain just precisely what

it is.

First of all, on CW, Mr. Zimmermann, would you explain what TV spot 30 means.

A It's a TV 30 second spot and the appearance on this record is purely the production of this spot to make it available.

Q In other words, you can't tell from this just how many stations it would be played on or anything of that sort?

A No,you can't.

Q And what is the next radio spot 30 mean?

A That is the same situation, where we developed in the merchandising department a 30 and a 60-second radio spot available for use.

Q What does consumer print mean?

A Consumer print is more of an institutional nature which is placed directly by our in-house advertising agency in various media.

THE COURT: What is consumer print?

THE WITNESS: Rolling Stone or -- usually rock presents something that would be done of an institutional nature, your Honor.

MR. PRETTYMAN: Did you understand that,your Honor?

THE COURT: Go ahead. Go over that again, please.

THE WITNESS: It is an ad that would be product oriented. It would say buy or available Rock and Roll album John Lennon and other information. And it is more -- making the consumer aware of the availability of the album rather than where to go buy it.

THE COURT: Well, was this something that would be put in, well, where would these -- is this copy for advertisements or what?

Q Distinguish consumer print from trade here I think that is what your Honor is getting at.

A Consumer print would be in publication that are consumer -- go directly to a consumer. Rolling Stone magazine, National Lampoon.

THE COURT: I see

Q And that is distinguished from trade? What does that mean?

A Trade is the Billboard, Cash Box, Record World, the publications that are normally read by the trade and not by consumers.

Q And trade would be more oriented toward your direct customers?

A Customers, radio.

Q Would you tell us what three LP ads means?

A That's one ad in each of the major trade

publications which are Billboard, Cash Box and Record World.

Q And three single ads?

A Were three ads plugging the single record in the same three trades. Again taking advantage of the album.

Q Poster film, is that one thing or two things?

A A film is what is used from the final graphic or the final album art after it has been refined and it is blown up in order to make a poster and of course the original is the quantity of the posters.

Q The Mobile?

A The Mobile is a merchandising piece which hangs from a ceiling. The film, here again it's a different size unit. So new film must be developed of different size.

Q What is the figure next to buttons, that product quantity looks like 1M?

A 1M would be 1,000.

Right. And the T-shirts I think you explained last time?

A Yes.

Q All right, now, referring to Defendants' Exhibit CX for identification, would you start at the top, please and tell us, explain to us --

THE COURT: Do you have any more copies of CX?

MR. SCHURTMAN: CX is not yet in evidence.

MR. PRETTYMAN: Not offered.

THE COURT: Are you offering that?

MR. PRETTYMAN: Yes.

THE COURT: Any objection?

MR. PRETTYMAN: I was just going to let him explain it, but I will offer it now.

MR. SCHURTMAN: Let me find out what it is.

MR. PRETTYMAN: That is what I was trying to do.

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q Who prepared CX?

A The Creative Services Department under the direction of Mr. Dan Davis, the head of the department.

Q When was it prepared?

A Last week.

Q So it was prepared for the purposes of this trial?

A Yes.

Q During the recess?

A Yes.

Q Now, in the upper right-hand corner, it says, "Release date February 10, 1975." What does that mean?

A That means that the album was released during that week. If you recall, on some of the sets of figures we had, record companies tend to deal in weeks, numbered by the first day of the week. No matter when the actual release was.

Q All right. Could we put on it a date when it was prepared so there won't be any confusion. It looks like --

THE COURT: Write prepared.

MR. SCHURTMAN: Looks like a contemporaneous document otherwise.

Q Why don't you write on it in your own handwriting prepared and the date?

A Should I put the date that I first saw it?

Q I think that would be close enough.

A The 25th.

Q It was prepared March 25th, 1976?

A Yes.

Q Okay. Thank you.

Now, does this purport to be a complete recap of everything that was done pursuant to your marketing plan?

A Yes.

Q Okay.

MR. SCHURTMAN: In that case, as a summary of what was done, without conceding that it was done, I won't object to it. Argument as such.

THE COURT: This is evidence, all right, thank you. CX is received on that basis.

(Defendants' Exhibit CX was received in evidence.)

BY MR. PRETTYMAN:

Q Would you tell us, first of all on the TV spots, what was actually purchased?

A In terms of television stations?

Q Spots, yes.

A We purchased, I think, one spot in San Francisco, 25 in New York, and 30 in Houston, Texas.

Q All right.

THE COURT: Wait a minute.

One in San Francisco, 25 in New York and 30 in Houston?

THE WITNESS: Three.

THE COURT: Three in Houston?

THE WITNESS: Yes. I must add that after this period of time it is virtually actually impossible to recapture a great deal of information on co-op advertising which this go under.

THE COURT: Keep your voice up,please.

THE WITNESS: I am sorry.

Q What does the February 11th date signify?

A That was the date that --

THE COURT: Do you have another copy of this exhibit?

A That was the date that production began, or was ordered to begin on the television spot.

Q All right,and can you tell us why nothing was ordered before February 11th?

A I don't think there was anything available in terms of the actual graphic to begin to shoot from.

Q Tell us what you have to hand in order, when you refer to graphic, what do you have to have in hand in order to order a TV spot?

A We must have the finished art work in its final form.

Q And the March 7th date means what?

A That was the date that we received the finished produced television commercial spot.

Q And then what would you do with that?

A We make that available to our field organization on an order basis. As they order, we duplicate spots and ship them to them.

Q And how long does it take to get that to them?

A In this case they are usually done first class mail or pouch so they will have it generally within 48 hours because of the reproduction time that was bought.

Q How many major markets are there in terms of marketing an album?

A About 22 in the general sense.

Q What would you have normally have done with this Rock and Roll album in terms of those markets if you had had the time?

A Well, we had planned and I think it came up in testimony during the last meeting, we planned a relatively major television assault and the expenditure on television would have probably approached $150,000 which would have encompassed about 50 to 75 spots in each of those major markets.

MR. SCHURTMAN: I object, your Honor. The witness is now testifying to purely hypothetical plan. He says we would probably have done something else. But the last time he testified, that after Mr. Lennon approved the plans before they knew anything about the Roots album, no changes were made in the plans.

MR. PRETTYMAN: Well, your Honor, the testimony is --

MR. SCHURTMAN: I think this is purely hypothetical testimony.

MR. PRETTYMAN: I am sorry to disagree, but the testimony was that the plan that was presented to Mr. Lennon contemplated advertising on television, but it is my recollection that nothing was said about the extent of it. Either the amount of money or the spots.

THE COURT: I overrule the objection, except for this. I want to know whether you are referring to your own present opinion as to what would have been done, or whether you are referring to an actual discussion or a written plan or what? I don't want to just kind of go through here and mix a lot of things up. Now you are talking now about, and we will get to it, I will ask you a question in a minute.

You mentioned before how many spots in each major market.

THE WITNESS: 50 to 75 depending on the size of the market and the cost of television in that particular market.

THE COURT: What is the basis for your saying 50 to 75, is it customary or is it a plan?

A It was a plan that was discussed.

THE COURT: This time or what?

THE WITNESS: During the fall of 1974. We had come off an extremely television promotion in behalf of the Beach Boys which had worked out very successful. This album appeared to be one that could be equally successful with the same marketing ingredients and advertising expenditures put on its behalf.

THE COURT: Did it come to the point of actually discussing the extent in dollar terms or the extent in terms of number of spots? Did it come to the point of actually discussing what you would do for the Rock and Roll album?

THE WITNESS: It was discussed in terms of duplicating the initial stages of the Beach Boy campaign.

THE COURT: Which would have involved what you are talking about?

THE WITNESS: Yes, sir.

Q So that the record --

THE COURT: Are you telling me that you only played, well, that would have been a total of how many TV spots?

MR. PRETTYMAN: I get it between 1100 and 1650, your Honor.

THE COURT: OK, go ahead, Mr. Prettyman.

Q So that we will be clear on this, what you had contemplated as compared with what happened, and I want to be sure that these figures are comparable, what you contemplated was in the area of 1100 to 1650?

A Yes.

Q And what actually occurred was 29?

A Yes.

Q All right.

MR. SCHURTMAN: When was this contemplated? I'm still not clear.

MR. PRETTYMAN: He explained that. In the fall of 1974.

Q All right, now, if you will turn to Radio; did you in fact purchase on all the major stations?

A We did make some national time buys which encompassed 12 to 18 spots in every major top 40 station,every major market.

THE COURT: Say that again, please.

A There were national time buys, as we refer to it, in which we purchase between 12 and 18 spots, commercial spots, on the most significant radio stations in the key markets.

THE COURT: OK.

Q So is it fair to say that there is, that the Roots album caused you no specific problem in terms of the number of stations that you were on?

A Right.

THE COURT: OK.

I don't understand that. Are you saying that as far as radio, there was no effect on Roots album?

MR. PRETTYMAN: No. I am breaking it down into sections, your Honor. He has testified that there was no effect from Roots album at least in terms of it.

THE COURT: Did he testify to that?

MR. PRETTYMAN: He just said that.

I asked him the question, whether there was any effect by Roots on the number of stations that he was-- on radio. And he said there was no effect.

THE WITNESS: It didn't change our opinion.

MR. PRETTYMAN: That's correct. OK.

Q Now was there an effect by the Roots album in terms of radio?

A Yes.

MR. SCHURTMAN: I object to the form of the question. What does he mean by "effect of the Roots album"?

Q I will ask him.

THE COURT: Well, I think we can just go on. I will

overrule the objection.

Q Tell us what impact, if any, there was on the radio advertising as a result of the Roots album, the delay, the various things that you have discussed?

MR. SCHURTMAN: I still object, your Honor, and ask for a continuing objection in that when he says the impact of the Roots album, does he mean the impact on his thinking, does he mean the impact --

THE COURT: I don't know why we suddenly get into some different format. Why can't you tell me as you did with the TV what you planned, how it turned out. You do it in your own words. What was planned on radio?

A When we came to the situation, your Honor, of the Roots album, and the impending television campaign to be put on behalf of it; radio is something that we can buy very quickly -- in other words, we can buy spots on Friday of one week or purchase the time at the end of one week and have the spots in most cases run seven days later.

We were prohibited, we in our mind, from running television;because of the Roots album being advertised on television, we had every reason to believe that it would be advertised quite heavily, so radio was an expeditious means of announcing the release of the album.

THE COURT: Are you telling me you sort of

substituted radio advertising for TV advertising?

THE WITNESS: Well, substituted in the sense of we had to do something to make everyone aware of the release of the album.

In terms of being an effective substitute, no, because you just can't buy that much radio time. Television being a visual media--

THE COURT: Did you do less TV and more radio than you originally planned?

A Yes.

Q You will note a date of arrival of February 13 of the radio spot.

Would you explain what that date of arrival is?

A Yes. That was the date that the finished radio spot was arrived at in the tour and we were able to service it to our district sales offices.

Q How long is it between the time of the date of arrival and the time that these spots actually get on the air?

A Oh, from about ten days, I would imagine --

MR. SCHURTMAN: I object, your Honor, the witness is imagining. Doesn't he know when these radio spots went on?

THE WITNESS: An educated guess.

THE COURT: Objection overruled.

Q Are you basing these statements on your experience?

A Yes, I am.

THE COURT: You are saying that the radio material things arrived on the 13th?

MR. PRETTYMAN: At Capitol, and he is saying that they then would have gotten on the air ten days later.

THE COURT: Go ahead.

Q Was that delay on February 23 prejudicial in terms of you --

A The radio spots should have been utilized on the same week that the album was released, within days of it being received at retail sale.

Q All right.

THE COURT: And that release, you are speaking in terms of weeks, so that release would be --

MR. PRETTYMAN: He missed it by ten days is what he is saying.

THE COURT: The 13th was a Monday. Didn't we have that before? Wait a minute. We had some dates before. When was the release of "Rock and Roll"?

MR. PRETTYMAN: We had 300 delivered on the 12th and a more substantial number on the 13th so we considered

the 13th as the release date.

THE COURT: And the February 10 at the upper right-hand refers to what again?

MR. PRETTYMAN: The week of the release,planned release date -- this shows that the 13th was on a Thursday and the 23rd would have been on a Sunday.

THE WITNESS: The spots would have started running over that particular weekend.

MR. SCHURTMAN: Your Honor, I think there was a pending question which I wanted to object to.

Could I have it read back?

(Question read)

MR. SCHURTMAN: Your Honor, at this point I am going to ask you for a continuing objection to questions which say "How did this prejudice you? How did it hurt you?" unless the witness ties it into specific sales figures which you saw this morning.

We have been getting this general testimony for days now, about we were hurt by something, but he doesn't tell you how they were hurt.

THE COURT: Look, I am the one to try to get past the generalities. But I can only have it one step at a time. I don't know whether it is intelligently tied in with specific sales figures or what. I just have to hear

the witness tell me his version and I will evaluate it and maybe it adds up to something, maybe it doesn't add up to anything.

MR. SCHURTMAN: If he offers it subject to connection, fine.

THE COURT: But I don't think you can tell him how to present his case. He has got to present it and then maybe it doesn't add up to anything. I don't know. But I will have to let him do it.

MR. SCHURTMAN: All right. Note my objection.

THE COURT: OK.

Q Would you move on to consumer's prints-- posters?

THE COURT: Before we get away from TV, what was preventing you from engaging or having 1100 to 1600 spots?

THE WITNESS: In the first place, we had every reason to believe that Adam VIII would be out with a very heavy television campaign. And at that point here again we had no idea what their price point would be. Six weeks down or whenever we became somewhat secure in the fact that they would not be running it, we'd already established ourselves with a $5.98 retail album, which really does not give us the margin to run a significant television campaign.

THE COURT: All right. Let me get this. The margin you are talking about is, I guess made up this way -- you were selling the $5.98 album for $2.87, right?

THE WITNESS: Right.

THE COURT: And if it had been $6.98, you would have sold it for $3.36?

THE WITNESS: Yes.

THE COURT: You are saying that the 50 cent difference made the difference between your ability to go to TV heavily?

THE WITNESS: Yes, in large part. The sales department spends these particular funds, earns money as percentage of sales and our original projections were in the neighborhood of 700,000, 750,000 units based on a significant television campaign.

Not too long after release, in this particular instance, we were, as I mentioned, originally faced with the prospects of Adam VIII's campaign and then with a lower-priced album, and we had already lost our momentum on top of it.

So it became a situation whether it would not have been wise to proceed with a major television campaign.

THE COURT: What do you mean "lost your momentum"?

THE WITNESS: Well, the album was falling off the

charts, or was off the charts, whatever, you know, we had been inhibited in our launch, in our estimation. So that we really didn'thave a momentous situation. Records tend to die out and people lose interest. There are a lot of new records. And it is very difficult to revive interest ina record once it hasn't really proven out to be a major success.

That is why --

THE COURT: Are you saying you wouldn't go with an album like "Rock and Roll" after several weeks and whatever it was doing, you wouldn't feel you could revive interest by a heavy TV campaign?

A Not really, mainly because, your Honor, it takes-- by the time you can -- you have to deal through various agencies to buy the time and you buy time that is called available time which is much below the book rate of the normal television spot, it is time that is just open, hasn't been purchased by anyone. So you are able to get some pretty terrific discounts and it is pretty much the only way that we or Adam VIII or any record company can afford to be on TV.

It takes six to eight weeks to really properly plan this kind of campaign. We were already four to six weeks or more down the road, so we just didn't -- there just

wasn't anything left by the time we did it and on campaigns that we have done that were successful it was either with new product on its first release or product that had new compilations of materials, with new packaging that gave it some real support.

THE COURT: All right.

Q Was there also concern at one time about this effect, two major TV campaigns on the two albums being at the same time?

A Certainly. That was a concern.

Q All right.

Your next line shows 3000 posters. Is that the normal number of posters that you would purchase for an album of this kind?

A Within normal limits it is usually three or four thousand.

Q So you were not prejudiced in terms of the number of posters?

A Correct.

Q Was time a factor in the poster situation?

A Yes, we were unable to develop the mechanicals for the posters, the actual beginning of production in the manufacture of the poster, until the 11th, by putting a great deal of pressure on vendors, something that I wasn't

aware of at our last meeting. We did get posters on February 15 in our Los Angeles distribution center which probably means that during that week we probably had posters in Los Angeles. However, in shipping these things around the country and by the time they get to another distribution center out to a sales office, into a salesman's hands or shipped to an account, you are talking about at least another two weeks.

So it put us behind in the neighborhood of two or three weeks.

Q All right. Tee shirts; what is the normal number of tee shirts that you would buy for an album of this type?

A We will usually buy anywhere from three to five thousand, probably an average of around four.

Q And you bought how many of these?

A 1450.

MR. SCHURTMAN: Your Honor, I object to the witness' reference to what they usually do without any underlying evidence.

THE COURT: Overruled.

MR. SCHURTMAN: I don't know what they usually do.

THE COURT: Well, he says they usually do it.

That's what he says.

MR. SCHURTMAN: And you told him the last time to bring in comparative information.

THE COURT: Not on numbers of tee shirts. I did not direct that.

Overruled.

Q And was there a time factor in the tee shirts and, if so, would you explain that to us?

THE COURT: Why did you buy less?

THE WITNESS: Primarily, your Honor, because tee shirts you have to find a mill that has the shirts available and the colors that you need. And it takes a long time to get them as evidenced here. We ordered on February 12th and did not receive anything until the 27th. And here again throughout the distribution process there was an additional two weeks before there was sufficient coverage nationally.

Q On buttons, how many buttons do you normally purchase for an album of this type?

A We usually purchase about three times this amount in the neighborhood of three thousand on average.

Q And was there a time factor here?

A Yes.

Q In regard to the buttons; would you explain that

to us?

A Well, here again, they were ordered on February 12th and were not received until the 22nd. Because buttons don't weigh a lot, I am sure they were shipped out by the mill, so we probably have fairly effective distribution probably four days after receipt, five days.

Q So that would have meant February 26th or 27th?

A Yes.

THE COURT: Now let's see, buttons; oh, yes, I see.

Q Post cards. How many of those would you normally have bought?

A We don't buy post cards a lot so I don't know whether this would be a good amount or not. They generally go out to press, to radio people, things of that nature.

Q This is not a major factor?

A No. It was something that was done because we needed to do the ingredients as quickly as we possibly could. In fact, you will notice there was no mobile here. We scrapped that because it would take a month to produce. They need to be die-cut and specially boxed, and we just couldn't do it in time.

Q So the mobile was eliminated?

A Yes.

Q On the post cards, even though you say they were a minor factor, were they late?

A Yes, we didn't receivethem until February 28th.

Q And then what do you do with them? Do you mail them directly from Los Angeles or do you send them somewhere else?

A Some are mailed directly from Los Angeles, others are mailed to promotion men around the country, and they will mail them on a local basis.

Q Stickers. What is your general practice in regard to ordering a number of stickers for a major album?

A We will usually do three to five thousand. They are quite effective in that they can be stuck up just about anywhere, but here again, because of time, we only did a thousand.

We didn't receive those until -- excuse me -- the 26th, and this was another thing that got kind of caught up in the confusion of the whole moment.

Q On the billboard, could you tell us when the billboard, when did the billboard actually go out?

A The mechanical billboard on Sunset Strip?

This is Billboard Magazine.

Q All right. Would you explain what the Billboard, Cash Box, and Record World refrence is to?

A OK. On an album of major release we normally run all three trades a full page, in four color. Production time, the trade magazines themselves need an extra week in order to run four color. We ran a two-color ad which was placed in February 11th, which is probably a Wednesday -- no, it is a Tuesday -- Wednesday being their deadline. It was in the magainze on February 17 which was the Monday following release and a week later then we normally like to do it.

Q And in your judgment is four color more effective than two-color?

A Absolutely.

Q Did your position in the trades,the position of your advertising in the trades, was that affected at all?

A Yes, and I don't recall exactly what positioning we ended up with, but as a general rule, you must have two or three weeks because record companies fight very hard for position whether it be back page or opposite one of the charts which many people will go to first and keep the magazine open there, and I really don't recall how we did end up positionwise but I know we couldn't have dictated position.

Q Well, would the late ordering have affected your normally -- would you expect that to affect your position?

A Oh, absolutely, absolutely.

Q Would you explain at the top of the next pate the reference to Rolling Stone?

A Rolling Stone is a national publication that needs a great deal of lead time for advertising production.

Because of receiving the graphic late, we were unable to develop the ad and give it to them until February 20, which is probably a dealine for the May issue.

Q Mr. Zimmermann, if you have all the time you need on an album of this caliber, what is the ideal date for getting your advertising in Rolling Stone as compared with the release date of the album?

A Ideally this album should have been in the March issue.

THE COURT: Let me just go back over that a little bit.

How often does Rolling Stone come out?

THE WITNESS: Twice a month, I believe, bi-weekly. It should have been in the March issue.

THE COURT: And when would you havehad to place it for the March issue?

THE WITNESS: Some time around the beginning of January.

Q What about National Lampoon?

A That was pretty much the same problem.

Q Did you also prefer to have that come out in March?

A Yes.

Q What about -- what is the Sunset Strip board?

A It is a billboard that is put up on the Strip, it is on top of a building. We do that with as many major acts as we can.

Q When, in connection with the release of an album, would you want that billboard to go up in the normal case?

A Pretty much as close to release date as we possibly can. It gives it that sort of impact.

Q Was there a press kit prepared?

A Yes. Where it says "Special Folder, Die Cut Black."

Q What is that?

A That is the actual folder that the press and publicity information goes in. It generally carries the graphic from the album cover.

Q Is 1400 your normal number for a press kit?

A Yes, as far as I know, it is.

Q So you were not prejudiced in regard to the

number?

A No.

Q Can you tell us, is there a time factor in connection with the press kit?

A Yes, because you want the press to be alerted to the release of the album. If not at release date, sometimes even a couple of days before, so that usually happens during the first week or the week prior to release.

These are mailed directly out from the Tower so receiving them on the 27th there are some parts of the country that won't get them until probably four days later.

THE COURT: Again, you said this - - when should they have been sent?

THE WITNESS: During the week of release or the week prior to release.

BY MR. PRETTYMAN:

Q Mr. Zimmermann, you testified at our last session that based on your best judgment you estimated that the two albums after Shaved Fish would be affected to the extent of 150,000 copies each or a total of 300,000 copies.

Have you reconsidered that estimate during the intervening period?

A Yes. We had some conversations about it and in thinking more and more --

Q Who is "we"?

A I talked to Mr. Posner primarily who is an analyst at Capitol, and he is quite familiar with catching sales trends.

Q Is he here?

A Yes, he is.

We decided that perhaps we should be a bit more conservative in that estimate in that harm done to releases after an album like Rock and Roll, and with an artist of Lennon's caliber, undoubtedly it would have more of a diminishing effect so that the effect on the next album would be 150,000, on the second and third it would diminish somewhat.

We thought logically and mutually that those numbers estimated would be probably between 120,000 on the first -- the second in reality, and about 80 on the third.

Q For a total of 200,000 instead of 300,000?

A For the two, yes.

THE COURT: The second would be the one after Shaved Fish?

THE WITNESS: Yes.

THE COURT: Go ahead.

MR. PRETTYMAN: I'd like this marked Defendant's Exhibit AN for identification.

xx (Defendant's Exhibit AN marked for identification)

THE COURT: You don't even know if you are going to put out albums, do you, from Mr. Lennon?

What is this about two albums after? You don't have a contract.

MR. PRETTYMAN: He is talking about compilations. They can put out as much as they want, as indicated in the previous testimony.

THE COURT: OK.

Q I show you what has been marked Defendant's Exhibit AN for identification and ask you to read that, please.

(Pause)

A It is to Capitol Records --

Q Just read it.

A It says: "Gentlemen" ...

Q Not out loud. Read it to yourself.

A Sorry.

Q Who is Jurgen Vollmer?

A He is the photographer who took the picture that

bs:mg 5 Zimmermann-direct

was used.

Q Who is Robert Edson?

A Robert Edson works for Capitol. He is in charge of our Eastern Promotion and Artists' Relations.

MR. PRETTYMAN: I offer that in evidence, your Honor.

MR. SCHURTMAN: For what purpose?

MR. PRETTYMAN. To show the dates that the photographs were sent. I am going to inquire as to whether he knows when they were received.

MR. SCHURTMAN: Does the witness know when they were received?

MR. PRETTYMAN: I'm about to ask him.

MR. SCHURTMAN: Ask him before you offer it.

BY MR. PRETTYMAN:

Q This is addressed to Hollywood.

Do you have any idea when they were received?

A Well, it was addressed to Hollywood. Mr. Edson resides in New York. So they were obviously received then. It should be pouched to us the 31st, being a Friday --

Q That's the date they were sent?

A We probably received them in New York estimated on Monday or Tuesday, which would have been the 3rd or 4th, at best 24-hour service to the West Coast, would have got

them to us on the 5th.

Q Do you in fact know, however, the exact date of receipt of the pictures?

A No.

Q You have no record that shows that?

A No.

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q Did you have anything to do with the purchase of these photographs from Mr. Vollmer?

A Personally?

Q Yes.

A No, I did not.

Q Are you aware of the fact that Mr. Kileen and Mr. Kohara spoke to Vollmer on January 28?

A I heard that testimony.

Q Are you aware of the fact that they bought the photographs that same day?

A On the phone, yes. However, they must have been sent from Germany or wherever Mr. Vollmer is.

Q Mr. Vollmer is in Brooklyn.

A All right.

Q You don't really know whether the photographs were received on January 28 or January 29 or February 7,

as Mr. Prettyman has suggested; you simply don't know, do you?

A Mr. Vollmer, in his letter dated the 31st, says he is transmitting six photographs.

Q That's right. But does that necessarily indicate that he didn't transmit them until that day?

MR. SCHURTMAN: Your Honor, I don't think this letter is probative of anything, other than the fact that Mr. Vollmer wanted a deal to get paid.

We already have testimony that they bought them on January 28.

MR.GRUMBACH: That is not my recollection of the testimony.

MR. SCHURTMAN: I will read you the testimony.

MR. PRETTYMAN: It was at one o'clock in the morning over the phone, Mr. Schurtman. They obviously couldn't get the photographs then.

MR. SCHURTMAN: They got them the same day.

MR. GRUMBACH: That's not what the testimony was, they didn't get them the same day.

MR. SCHURTMAN: I don't think that letter proves anything.

THE COURT: What happened on the 28th, an agreement on the phone to sell?

MR. SCHURTMAN: The 28th they went out and they spoke to Vollmer. They already had the photograph. Mr. Lennon had given it to Mr. King several months earlier, and then on the 28th when Mr. Lennon approved the marking plans, he said, "Why don't you talk to Vollmer and see if you can get a still better photograph?"

They tracked down Vollmer and the testimony up to now, this is the latest I heard of this, is that they got it on the 28th or 29th.

MR. GRUMBACH: That is not the testimony.

MR. PRETTYMAN: It is absolutely not the testimony.

THE COURT: Let's not argue about it. This is some evidence. I will receive it.

xx (Defendant's Exhibit AN Received in evidence)

MR. PRETTYMAN: Can I have this marked with the next exhibit number, CY.

xx (Defendant's Exhibit CY marked for identification)

REDIRECT EXAMINATION (continued)

BY MR. PRETTYMAN:

MR. PRETTYMAN: Your Honor, I'd like to make a statement in connection with CY.

CY are some handwritten notes written by

Mr. Kohara back during this relevant period. They were just found along with this marketing plan. It is hearsay. I recognize that it may well be subject to objection, but in view of the fact that it was found, I at least want to make sure that counsel has seen it.

I don't have Mr. Kohara here, unfortunately, to testify about it, but I at least wanted the record to be clear.

I do think the notes are quite relevant, but I am very much at a disadvantage in not having the witness here to say that he wrote them.

THE COURT: All right. Exhibit CY is marked for identification.

Are you offering them?

MR. PRETTYMAN: Yes, your Honor.

Can I just ask one question of the witness first?

THE COURT: Sure.

BY MR. PRETTYMAN:

Q Did you in fact receive that from Mr. Kohara?

A Yes, I did.

Q Did you discuss it with him to satisfy yourself that he wrote those notes?

A Yes.

Q And did he indicate the period when they were

written?

A They were written the same evening or the day after.

Q Of what?

A Of the 28th.

THE COURT: All right.

Do you have those, Mr. Schurtman?

MR. SCHURTMAN: I am reading them.

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q Who wrote this, Mr. Kohara?

A Yes.

Q Where is he now?

A Los Angeles.

Q When did he get this to you?

A Thursday of last week.

MR. SCHURTMAN: Mr. Prettyman, is this supposed to be a complete rundown of what happened at the January 28th meeting?

MR. PRETTYMAN: So far as I know, Mr. Schurtman, it is just exactly what it states, namely, some notes taken apparently by Mr. Kohara immediately after the meeting.

MR. SCHURTMAN: You are not offering it --

MR. PRETTYMAN: I certainly don't offer it as a

complete synopsis of what occurred or anything other than what it speaks for.

MR. SCHURTMAN: I object to it. If nothing else it shows when they got the photographs.

THE COURT: All right. Received.

What is the limited purpose?

MR. SCHURTMAN: The limited purpose is that these are some notes that Mr. Kohara made after the January 28th meeting. They are some notes that he made. They do not represent a complete summary of the meeting.

THE COURT: All right. Fine.

MR. PRETTYMAN: Does your Honor have that exhibit?

THE COURT: Yes, I do.

(Defendant's Exhibit CY received in evidence)

BY MR. PRETTYMAN:

Q Who is Mr. Kohara?

A The Director of the Art Department.

Q Does Billboard receive any sales figures directly from Capitol?

A No, they do not.

Q So far as you know, do they receive any sales figures directly from any other manufacturer?

A They probably receive indications of sales figures. I doubt if they receive any actual computerized

tablets.

MR. PRETTYMAN: That's all I have.

I am going to introduce the figures in regard to tapes through Mr. Posner, your Honor.

THE COURT: Mr. Schurtman.

RECROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Let me direct your attention --

MR. PRETTYMAN: Excuse me, Mr. Schurtman. I am sure this is implicit in the proceeding, but Iddn't mean -- I of course reserve my additional redirect as a result of the cross which is now to take place.

THE COURT: Sure.

BY MR. SCHURTMAN:

Q Directing your attention to Mr. Kohara's notes, I notice that he states-- these notes are dated January 28:

"I had to deal with the photographer Jurgen Vollmer there and then to gain access to the photos."

Did you discuss with Mr. Kohara whathe did on January 28th to gain access?

A Yes. They called Mr. Vollmer on the telephone and obtained the rights to use them. That was verbally on the phone.

Q Do you know whether Mr. Kohara saw Mr. Vollmer that day or the next day?

A I do not.

Q When did you make theplan to put on all these TV spots that you were telling the Court about?

A This was a project that myself, our financial sales manager Dennis White, I believe Mr. Kileen was present, in October or November of 1974, in that when we released the Rock and Roll album, which we were thinking of more in terms of spring, April or May, that we would give it the same sort of an advertising treatment that we had done the previous year with our Beach Boy album.

Q Mr. Zimmermann, every time you testify you push the release date back one more month. Two weeks ago it was March or April and now it is April or May.

A OK. April.

Q Now it is April.

Can we fix the projected release date?

A We had never sat down and said: It is going to be April or May or March. We talked about in terms of the spring and how it would fit in better and float with our plans and what was going on at the particular moment.

Q So that when Mr. Menon testified about March, this is also something that he didn't know anything about,

right?

A Mr. Menon was testifying that we would release in the spring and March being the first month of spring.

Q All right.

So you sat down in October, 1974, and you talked about the Rock and Roll album?

A Yes.

Q What did you know about the album at that point?

A We knew that it was being worked on for some period of time with Mr. Spector. We were anticipating it. We were pretty excited about the whole project.

Q You knew that the Spector tapes had disappeared and that they had not been retrieved until many months later, didn't you?

A Yes.

Q Did you know how many songs Spector had recorded?

A I didn't know that.

Q Did you know that he had only recorded nine songs?

A I didn't know that.

Q Did you know that Mr. Lennon only found six of these salvageable?

A No, I didn't know that.

Q Did you know when you had that meeting in October

that Mr. Lennon had told people he was disgusted with the project, or words to that effect?

A No, we had no reason to believe that.

Q Did you know whether Mr. Lennon was recording any additional songs?

A I don't recall that.

Q Then all you really knew in October, 1974, was that more than a year earlier Mr. Lennon and Mr. Spector had recorded some songs and you didn't know what had happened since then, isn't that so?

MR. PRETTYMAN: Objection.

A No. We were told that the album would be forthcoming, would probably be a spring release, and we were making plans based on that information.

If you recall, I said it was October, November. I'm not sure of the exact month in which --

Q All right.

Who told you in October or November that the album was forthcoming and that there would be a spring release?

A I believe it was Al Coury.

Q Did you ask Coury whether he had listened to any finished product?

A No, I didn't because it is not very common that

you would-- or have-- it isn't that common that you would have the opportunity to listen to something that far in advance of release.

Q So that was the extent of your knowledge in October, November of 1974 when you started making your TV plans?

A Yes. We knew the concept of the album and we had some experience with a previous John Lennon album you alerted me to this morning, on the Live Peace in Toronto album in which he had done some other people's material and had done quite well.

Q How much had that sold?

A I don't recall, but I do recall thatit was a certified gold album so it did respectively well.

THE COURT: A what?

THE WITNESS: Certified gold.

THE COURT: Which means what?

Q How many sales did it have?

A At that time probably in the neighborhood of 400,000, but if memory serves me, at that point in time-- that was before I was in the field with Capitol and was not that aware of national sales figures. I'm sure those figures are available.

Q Who certifies it as a gold album?

A The Recording Institute of America.

Q On what do they base that certification?

A On sales.

Q Where do they get the sales figures from?

A From the record company. They send an auditor in who audits our sales records.

Q Are these your consumer sales figures or your customer sales figures?

A Customer sales figures.

Q Are they net of returns?

A They are net.

Q But your customer sales figures aren't necessarily the same as consumer sales figures?

A That's true.

Q When you made those plans for TV campaign, did you put anything in writing?

A No, it was premature for that.

Q But how many spots did you decide on?

A As I mentioned before, between 50 and 75 in each of the top twenty-two markets.

Q You have a specific recollection that that decision was made in October or November of 1974?

A It was discussed, as I mentioned before, to duplicate a similar sort of promotion just six months

previously.

Q How many spots had you used for that other promotion?

A We used the 50 to 75 in each major market and spent $150,000, and the promotion was so successful we enlarged upon it and continued our television exposure and spent about another $100,000.

Q When Mr. Kileen and Mr. Kohara met with Mr. Lennon in New York on January 28, 1975, that is the Sherry-Netherland Hotel meeting, at which they submitted promotion plans to Mr. Lennon; did they say anything to Mr. Lennon about all these spots that you were going to put on, TV spots?

MR. PRETTYMAN: I object to the question. This gentleman wasn't there. We have had people testify who were there. We had Mr. Lennon testify and Mr. Coury testify and Miss Pang testify and Mr. Seider testify, all of whom were participants.

This gentleman wasn't present.

Q Do you know whether they did?

A I don't know.

Q Were you aware of the fact that Kileen and Kohara were going to New York in order to convince Mr. Lennon that he shouldn't put out the album as a TV package

but should put it out with Capitol as a regular retail package, did anyone tell you that?

A No, they did not.

MR. GRUMBACH: I think the question is misleading as to what TV package means.

Q By TV package, I mean the type of thing that Adam VIII puts out, the mail order TV package.

A No, I do not know.

Q Did anyone tell you that an attempt was being made to convince Mr. Lennon to sell the album by regular retail rather than through a Levy-type TV promotion?

A We assumed - - I did personally, without really being informed or asking the question, that because of a contract that EMI Records had with Mr. Lennon that we had exclusive rights so I didn't give it a second thought.

Q You were the boss of Kileen and Kohara, weren't you?

A Yes. It was my understanding that they were going back to work on an album jacket.

Q That was your only understanding?

A As a -- yes, basically.

Q Did you discuss with them in advance what type of a presentation they would make with Lennon?

A Actually, Mr. Al Coury did.

Q He discussed it with you?

A No, with them.

Q So you didn't really know?

A No, I didn't.

Q Did you suggest to them-- did you suggest to anyone that as part of their presentation they should tell Lennon about all these tremendous TV campaigns you were going to put on?

A No, because as I said,their conversations before leaving for New York were with Mr. Coury,and it was my understanding that they were going back to develop an album cover.

Q Your counsel have told the Court in a statement of facts that on January 28 Mr. Lennon gave his final approval to Capitol's marketing and promotion plan.

Do you recall that?

A I recall hearing that, yes.

Q And as far as you know, that is correct, isn't it?

A No, it is not, because no marketing plan at Capitol at that point, or at any point, is approved until it is signed by the Vice President of Marketing, which at that point it had not been signed.

Q I'm not talking about your approval. I'm talking about Mr. Lennon's approval.

A I can't -- I don't know about that.

Q You testified at the last session that after the plan was approved by Mr. Lennon, no changes were made in the plan; do you recall that?

A To the best of my knowledge the plan that I eventually signed was discussed with Mr. Lennon. I have no reason to -- that is the only plan I have ever seen, the one that I signed.

Q The thing that puzzles me, Mr. Zimmermann, is that if in fact in October, November you had made these grandiose TV plans, and if in fact Mr. Kileen and Mr. Kohara, your subordinates, met with Mr. Lennon on January 28, and if in fact he approved final promotion and marketing plans, and if in fact there were no changes made in these plans, there is something missing in this equation: what happens to the TV?

A We have a difference in semantics, I'm sorry. A marketing plan, as discussed by my company, encompasses the document which was just entered in evidence, that lays out the mechanical and production necessary to market -- or to develop the ingredients for the marketing plan.

It does not speak of time buys. Time buys come from a different area. Mr. Kileen and Mr. Kohara had

nothing to do with time buys. They developed the television spot and the radio spot and the poster, and all those ingredients. They do not spend one nickel in the actual placement of a television spot.

Q All right.

I take it that as you sit here today you don't really know what Kileen and Kohara discussed with Lennon?

A I don't for a fact know, no.

Q Getting back to Defendant's Exhibit CZ, which is the summary of the various dates on which your marketing plan was implemented, in the first place, can you tell me what impact any of these delays had on your actual sales, either to your customers or to consumers?

And I suggest that you look at Plaintiff's Exhibit 253, which are Capitol's own figures.

Now I ask you the same question I asked you this morning: What impact did it have on the sales in relation to other albums?

A It had impact with the consumer because there is no point-of-purchase-material to attract his attention when he walked into a record shop where these records are for sale.

Q So now we are talking about the first two weeks. The first two weeks --

THE COURT: What was missing in the record shops?

THE WITNESS: What is that?

THE COURT: What was missing?

THE WITNESS: Just about everything that is ingredients on the marketing plan: the poster, the tee shirt, the stickers, the buttons, the consumer ads were late which would attract consumers, the radio spot was late, the television spot, due to the limited use that we did give it was late. There was nothing there at the day of release. We needed that absolute impact. All this in terms of consumer awareness would also reflect in revenues gained on that particular album.

Q Did you have all of the necessary ingredients of your marketing plan when you sold Walls and Bridges?

A Yes.

Q There was no special pressure on that, was there?

A Oh, no.

Q Look at the first two weeks of Rock and Roll and Walls and Bridges, as reflected on Plaintiff's Exhibit 233. Rock and Roll you sold 270,000 to your customers, Walls and Bridges you sold 275,000, approximately?

A Yes.

Q So you sold a lot more Rock and Roll than Walls

and Bridges.

How do you explain that if you say that you didn't have the impact of these two weeks?

A The real word is what the consumer does. If we had sold five million the first day, and the net result wouldn't -- it wouldn't have made any difference.

Q You are telling the Court now that your sales to customers as distinguished from consumers are really irrelevant?

A Not irrelevant.

Q But not terribly significant in terms of what this case is about?

A They are significant.

Q What is the significance?

A We are saying in the situation we were faced with, where the tremendous pressure was on our sales organization to get as many records out as they could in the first two weeks, given a different- - you see, given a different set of circumstances, our plans would have been made differently and the ongoing sales we believe would have been much more substantial. We wouldn't have fallen off so substantially after the first two or three weeks.

Q Why did the fact that you put more pressure on your sales organization hurt your sales to customers?

If anything, they improved your sales to customers.

THE COURT: Look, Mr. Schurtman, he has said many times, he may be right, he may be wrong, but let's at least grapple with his testimony, that the effect was on the ongoing sales, and I think that it is-- what he is saying is that the salesmen went out and were able to persuade the stores and the rack jobbers to buy a lot of records.

That was in the first two weeks or even-- whatever, three weeks. Then the ability to keep on selling records to the rack jobbers and to the stores would depend on the ability of those-- of the retailers during that time to actually move them to the consumers.

If they get a lot of stock in and the records are not moving to the consumers, they won't keep ordering them because they will not be able to resell them.

He has said that many times.

MR. SCHURTMAN: So far he hasn't --

THE COURT: He may be right, he maybe wrong, but that is his tsetimony.

MR. SCHURTMAN: He hasn't said it.

Do you accept the judge's understanding of your testimony?

THE WITNESS: Absolutely.

MR. SCHURTMAN: At least I have a departure point for the first time since I have been examining.

THE COURT: I don't think it is the first time.

MR. SCHURTMAN: I suggest you look at the record, your Honor.

Q Let me ask you two things: First of all, can you point out on this chart, which only covers the first thirteen weeks, where the sales to consumers of Rock and Roll started dropping off, at what point?

A At what point?

Q Yes.

A Well, obviously --

THE COURT: Oh, Mr. Schurtman, I don't think he ever -- how can you tell anything like that from these things?

MR. SCHURTMAN: Let me ask him, your Honor, now, please. This is --

THE COURT: I don't know whether they even started, and you talk about a drop off. You will not recognize the particular significance of these figures, you just won't recognize it.

MR. SCHURTMAN: Judge, I'm afraid you won't recognize them unless you give me a chance.

There is a very definite indication on this

chart as to what happened to consumer sales and that has to do with returns. I am going to ask this witness about returns, and I am going to keep hammering away at these sales figures where the witness has given me ten different types of testimony this morning until I get the answer or until you tell me to shut up, Judge.

THE COURT: I am not going to tell you that.

MR. SCHURTMAN: Please give me a chance to cross examine the witness. You keep giving the witness his answers before I even ask him the question.

THE COURT: No. I am just trying to indicate to you thatthis is the record which he has already said, and the returns -- what are the returns going to show? 25 returns?

MR. SCHURTMAN: Exactly.

Let me ask the witness what the procedure on returns is.

BY MR. SCHURTMAN:

Q You have told us this morning, Mr. Zimmermann, that your customers as a practical matter have an unlimited return privilege, is that right?

A Within reason, yes.

Q Well, is it possible for a customer then to order 10 million records on the theory that if he can't sell

them he'll simply send them back to you?

A We wouldn't sell him 10 million records if we didn't feel he had a very good opportunity of selling them.

Q How soon does a customer have to pay for the records that he does buy?

A He has a split billing, 30 and 60 days.

Q He has to pay for them 30 or 60 days?

A Right, half on each.

Q If he holds the records and doesn't return them until six months later in the meantime he is out the money?

A Yes.

Q Isn't it fair to say that when a distributor of yours buys records and stocks them, if he can't unload them to the consumers within 30 to 60 days he will start sending them back to you?

A It would seem that way, but in reality it really doesn't work that way. We find that our highest return peak on almost any album is between a year and 18 months after release.

Q Between a year and 18 months?

A It just takes that long for the system to really wind down.

Q In the meantime the fellow has paid you for

your records and he keeps them?

A He has other records that are a year and 18 months old that he is sending back to us and buying new ones, so it's kind of a float.

Q If you are talking about highest return peaks, let's look at this exhibit again.

If you look at Walls and Bridges, the returns started getting heavy, relatively heavy in the 7th week and then they dropped off again.

A There could be many reasons for that particular week. Unfortunately, if we ship a large order to a major customer and he refuses it or sometimes the shipment may even be picked and picked and billed and they go to ship it and find that the customer has a credit difficulty and we can't -- the only way they can put it back into inventory and credit the customer's account is to show it as a return. They could have picked the wrong number.

Q Turning to Rock and Roll, if your customers bought -- let me add it up quickly -- 250 -- over 300,000 albums during the last two or three weeks of February, how long would they have kept it, these albums, before returning them to you if they couldn't sell them?

A I would say for the most part, there again, a year to eighteen months.

Q A year to 18 months?

A Yes.

Q You are sure of that?

A That's been our history.

Q What specific information do you have, if you tell me that these aren't your consumer sales figures, what information do you have that consumer sales didn't get off the ground during the first few weeks?

A Generally, feedback from our field sales people who will say it is going super well, it is going okay, it is going well, it is not doing well.

Q Does Capitol keep any records of consumer sales?

A No, we have no way of knowing that.

Q Why don't you have any way? You can get records from your consumers, can't you?

A Well, not with any accuracy. It's pretty sporadic. We would need to have a staff of gosh knows how many people just to do that kind of work.

Q You are telling the Court that you have absolutely no way of showing the Court what consumer sales were?

A No. What I said --

THE COURT: Look, I am not -- doesn't 232 tell you

something?

MR. SCHURTMAN: Which one is that?

THE COURT: That is ten months or so, I guess, or maybe 12 months. Somebody stuck a figure for February in here, but what would the returns -- can we figure the total returns by that date? You stuck a figure for net sales.

MR. PRETTYMAN: I think it is just a subtraction.

MR. SCHURTMAN: It is cumulative returns, your Honor. They were 93,000 as of December, 1975.

THE COURT: I am talking about as of now, or as of February '76, that is the -- the net is the 342,000 figure that is 110, and if we are talking -- I was just interested, can we --

MR.PRETTYMAN: I think you subtract it out, find it correctly.

MR. SCHURTMAN: These are your figures, so perhaps you should explain it.

MR. PRETTYMAN: I gave this to you so that this would be up to date, but I didn't know you were going to introduce it or I would have completed it.

MR. SCHURTMAN: It was explained on the first day.

A 342 from 367.

MR. PRETTYMAN: You just subtract these two

numbers, your Honor, and that gives you the answer.

A It probably would be a bit more than the 25,000 because we are really talking about net change, and there are some sales ongoing, though not substantial.

MR.PRETTYMAN: Do you want me to find out the exact figure?

THE COURT: What I was thinking was, if you are talking about consumer sales -- wouldn't you gather something from the net unreturned things after a year?

THE WITNESS: After a year to 18 months you would have a better picture, yes, your Honor.

MR. SCHURTMAN: That doesn't tell us how the consumer sales were doing during the first two months.

THE WITNESS: We get that information back from our field people.

Q But you don't get it in terms of figures?

A No.

Q So that you are not in a position to tell the Court to what extent, if any, your consumer sales were hurt?

A I think --

Q -- in the first few weeks?

A I think by showing that we have taken back over a hundred thousand albums --

Q That is over a year later. We are talking

about the impact in the first few weeks.

THE COURT: Mr. Schurtman, I don't mean to give anybody answers, I don't mean to cut you off, but I do have a right to expect you to take in what he has testified. You don't have to accept it. You can argue to your heart's content that I shouldn't accept it, but at least recognize what he has testified to.

MR. SCHURTMAN: What has he testified to, Judge? He has testified that consumer sales were hurt during the first few weeks.

I am asking him to what extent. You are supposed to figure out damages based on that.

THE COURT: He has said --

MR SCHURTMAN: That he doesn't know.

THE COURT: You go back and say how does 232, which talks about returns of 100,000 after a year, indicate anything about consumer sales in the first thirteen weeks? He has testified, and again I don't know whether he is right, wrong, lying, honest, I don't know, but he has testified that the -- out of the gross deliveries, which occur in the first splurge, the returns will come back by and large a year or 18 months later.

MR. SCHURTMAN: So where does that leave us?

THE COURT: So according to his testimony

the hundred thousand returns, which have been received as of now, do relate, at least in part, to what -- to deliveries made in the first 13 weeks and the inability to load all those records onto the consumer.

MR. SCHURTMAN: I don't see how you can infer that, Judge.

THE COURT: I don't infer that, except that is what he has told me. So if you say you don't understand -- I don't think you want to take in his testimony, and that's my problem with your cross.

MR.SCHURTMAN: My problem with the testimony, and with the Court's rulings I may add, at this point, is that th witness has shifted his position several times. We started out with the proposition that that the alleged return and the price reduction and the Roots competition and what have you hurt their sales.

Originally we were talking about sales to customers. He told you his customers were confused, customers being the distributors, and therefore, they didn't buy enough.

So we trot out these figures and suddenly we discover that not only didn't they buy enough but if anything he now claims they bought too much, so we get a change in the emphasis. Fine.

THE COURT: I just can't --

MR. SCHURTMANN: Then the next question is, well now, who was hurt? He says, okay, consumer sales were hurt because of the competition from Roots, the return, the fact that they didn't have the T-shirts in the shops in time, so I say, okay. In what respect --

THE COURT: Mr. Schurtman, you can argue that.

MR. SCHURTMAN: No, I want --

THE COURT: You are in the process of cross examining a witness and we have a limited amount of time for this case and I have agreed to sit in this courtroom with you until 7 o'clock tonight, or something like that.

But I have to at least expect that your cross examination deals with the testimony of the witness as given, and I repeat for the 15th time, it doesn't mean you are bound by it, or any of that stuff, but just deal with it.

He is the witness you are cross examining. You are not cross examining some other witness.

MR. SCHURTMAN: I am asking --

THE COURT:You really don't even act as if you know what he is testifving about.

MR. SCHURTMAN: I respectfully disagree with your Honor. I know exactly what he has testified about. And I have summarized it for you. All I am asking this

witness is to establish, if he can, something on which the other side has the burden of proof, namely, a causal connection between all these alleged delays on the T-shirts and posters and sales, and he can't even tell me what the consumer sales were.

MR. PRETTYMAN: Your Honor, I have the figure.

THE COURT: I agree with you, he has not -- you did ask him what information he has about consumer sales, and he says "No real statistics as far as the first thirteen weeks;" no question about it. What can you do about that?

MR. SCHURTMAN: The only other thing I can do --

THE COURT: He has the information or the lack of it that he's testified to.

MR. SCHURTMAN: The only other thing I can do is to reoffer the exhibit which you refused to accept before, in which are the Billboard charts which are the industry-wide accepted chart of consumer sales, because they are based not on rack jobbers, as this man toldyou, they are compiled from national retail stores and I will bring in someone from Billboard to testify to that.

THE COURT: Look then -- all right.

MR. SCHURTMAN: They show that the consumer sales were fantastic the first few weeks. Let me see those. When I looked at them before I thought we were

dealing with a kind of getting on the top twenty or something.

MR. SCHURTMAN: The record doesn't --

THE COURT: Does this have figures?

MR. SCHURTMAN: No.

THE COURT: Figures for consumer sales?

MR. SCHURTMAN: No. But it is comparative. It shows how it did with respect to every other record.

MR. PRETTYMAN: It is like a random sampling.

THE COURT: Mr. Schurtman, at this point I would like to have any reliable figures on consumer sales, it would be very helpful to me. If this had it I would receive it right now without any question.

MR. SCHURTMAN: Your Honor are you suggesting that it is my burden to bring in consumer sales?

THE COURT: I am really not suggesting it except for whoever has the burden of proof, I would like to have it. It is of interest.

MR. SCHURTMAN: I will let Mr. Prettyman bring in the consumer sales.

All I am telling you is that this is a nationally accepted indication of what consumer sales are. You don't make the top twenty in two weeks unless you are selling a hell of a lot of records to the retail consumer.

THE COURT: I knew it was in the top twenty before I had this exhibit. If it would help to get the record complete to have this exhibit, I will certainly have it.

MR. SCHURTMAN: I reoffer it, your Honor, for that purpose.

THE COURT: All right.

MR. PRETTYMAN: Your Honor, so far as I know, there are no such sales figures. We don't have them. I don't think anybody in the industry has them. Maybe Internal Revenue has them, I don't know, but we certainly don't. They are just not available. This isn't something which we have failed to get together. We are offering proof that is the best we can get, namely, of our sales and returns, which obviously showed something. They obviously give a very clear picture of acceptance.

Incidentally, I do have the figure that your Honor asked for, if you would like --

THE COURT: Let us rule on these.

What are you offering, 231 and that includes --

MR. SCHURTMAN: 231 to show great consumer acceptance during the first two weeks.

MR. PRETTYMAN: I object.

THE COURT: Is that one Billboard list? There are two pages.

MR. SCHURTMAN: It shows the entire 200.

THE COURT: This is from the Billboard of March 15th and it shows the entire top 200.

MR. SCHURTMAN: Right.

THE COURT: I will receive it.

MR. PRETTYMAN: Is my objection noted?

THE COURT: Your objection is noted.

MR. GRUMBACH: I'd like to join in the objection.

MR. BERGEN: Yes, me too.

THE COURT: You all join.

Do you want another week or what?

MR. SCHURTMAN: I don't need another week. I think it proves my point.

MR. PRETTYMAN: Do you want the figure that your Honor asked for?

THE COURT: What figure is that?

MR. PRETTYMAN: You asked for the return figure for this last column and Mr. Posner had it.

THE COURT All right.

Can we add thatnow.

MR. PRETTYMAN: 122,300.

THE COURT: Let's add it to the exhibit.

All right.

MR. PRETTYMAN: Your Honor, I think I wasn't

vigorous enough in my last protestation. I wonder what that billboard thing is being offered for.

MR. SCHURTMAN: It is being offered --

MR. PRETTYMAN: I think it is extremely misleading, if that is coming in to show anything have to do with sales. We don't know how that thing is composed. We don't know how many stores they go to, how reliable it is or what kind of survey is taken. We don't know anything about that.

The industry itself uses this for an extremely limited purpose, and that is to get a general idea of whether they are going up or down or a general idea in relation to other people, but they don't take this, as I understand it, as any kind of authoritative or actual guide to what is really going on.

THE COURT: All I am taking it for is the fact that the Billboard magazine says that this is in the top twenty on that particular date.

I must tell you,Mr. Schurtman, that in the last phase of this testimony we have gotten fairly deep in the question of actual first in the first two weeks, and I must tell you that that is being in the top twenty -- I don't know how that helps me very much except I assume if you are in the top twenty it means something, but how it helps to fix his -- the relative sales of this album in

relation to what it might have been or was in Walls and Bridges, or anything like that, I don't know.

MR. SCHURTMAN: Your Honor, I would --

THE COURT: Whatever the significance, I will take it. I will overrule the objection.

MR. SCHURTMAN: Your Honor, to expedite matters -- to expedite my cross examination, your Honor, I wonder if we could clarify some of the issues now.

As I understand it, this gentleman has been claiming, and I have been objecting constantly, that certain delays caused by the alleged rush prejudiced Capitol and that it sold fewer albums than it would have sold.

I am still trying to clarify, was that prejudice related to consumer sales or customer sales or both? Perhaps he could --

MR. PRETTYMAN: He has already testified to that about three times.

MR. SCHURTMAN: I wish he would clarify it for me. Obviously I don't understand it.

MR. PRETTYMAN: This is repetitive. I heard him say specifically that it affected --

THE COURT: Just so we don't have any -- look, I think I have heard some things, we all probably did, but it doesn't hurt to have it summarized. In light of all we

have been through, why don't you ask that question and see what the answer is.

BY MR. SCHURTMAN:

Q Do you understand my question?

A I think so.

Q Can you give me an answer?

A I will do mybest.

It is my feeling that it hurt us in our customer sales and consumer sales.

Customers because of the late arrival of ingredients, because of the great deal of confusion due to the Roots album, probably some due to the confusion created by my own people who were monktoring television, asking people if they had -- if they were aware of the problem, getting records out as fast as they could, but doing it without being properly prepared.

Q Let us stop with customers for a moment before we go on to consumers.

Now, Exhibit 233 does deal with consumers sales, does it not?

A Yes.

Q No question about that?

A Right.

Q Now, looking -- comparing --

THE COURT: When you say"customer sales" we are talking about the sales of Capitol to its customers, right?

MR. SCHURTMAN: To its customers, its distributors, rack jobbers and what have you.

THE RIGHT: Right.

Q Right?

A Yes.

Q Incidentally, does Capitolown any of these customers?

A I think at that time about six retail stores.

Q Did it own distributors?

A We have our own distributorships, yes, but not subdistributors.

Q When you talk about your distributors, these are your own agents?

A No, no, these sales are reflected to customers not any owned by Capitol Records.

Q Fine.

With respect to customer sales, let's focus only on customer sales now, looking at -- I will ask you to compare Rock and Roll, Walls and Bridges and Mind Games.

Can you tell the Court how in the first four weeks, three or four weeks, I don't care what period you

pick, customer sales were adversely affected?

A They were adversely affected in that there was not a proper marketing plan in effect that properly armed our customer --

Q You misunderstand --

A -- to sell the consumer.

MR. PRETTYMAN:: Let him finish the answer.

THE COURT: Let him finish.

A Therefore, that album became a negative because of the confusion of Roots, because of the lack of real momentum created by Capitol to sell off that album, and you see the resulting decline in sales exactly because of that.

MR. SCHURTMAN: You are asking the Court for dollars and cents, and that has to be based not on generalities --

THE COURT: Don't express --you can continue asking questions.

MR. SCHURTMAN: I have asked the same question ten times and I have gotten the same answer ten times. I want him to focus.

Q In terms of actual sales figures, I am now going to ask you quantify your answer in terms of numbers of albums, can you point to this exhibit line by line and show how these

delays and alleged confusions and so on hurt your customer sales? Let's look at the first line. The first line shows that for Rock and Roll in the first week you sold 183,000 albums to your customers: for Walls and Bridges you sold 16,000 to your customers. How were you hurt --

A That is not a true figure, Mr. Schurtman.

MR. PRETTYMAN: That was for one day.

A One day.

Q We will combine the first two weeks. The first two weeks show that you -- for Rock and Roll you sold ,000 to your customers, right?

A Right.

Q For Walls and Bridges you sold 224,000 to your customers?

THE COURT: You are not giving Rock and Roll all she got, Mr. Schurtman, 270 --

MR. SCHURTMAN: I defer to your Honor's mathematical ability, I am sorry.

Q In any event, Rock and Roll sold a lot more than Walls and Bridges. How were your customer sales hurt those first two weeks when you didn't have your T-shirts, your posters and all the other stuff?

A Because there was no plan in effect to put any momentum behind those albums, so that if you go further

down line by line by line you see a diminishing effect in that we never gained the proper momentum.

Q When you say line by line later, you are now talking about consumer sales, are you not?

A It is all related. That is why I can't give you the answer you are looking for. You can't do one without the other. You can't sell customers without consumers buying things. You can't sell a customer if there is -- if there is not a consumer demand.

Q My next question is, do you have any specific information, and I know I am repeating the prior question, but I want to pin it down once and for all, any specific information in terms of figures as to what consumers bought the first few weeks?

A All I have is feedback from various sales people around the country.

Q You can't quantify it in figures?

A No, their reactions.

Q All right.

Turning to this Billboard chart, let me ask you first, does Capitol ever refer to Billboard chart listings in its advertisements?

A Sure.

Q When you hit No. 1 you say you are No. 1 on

Billboard, don't you?

A Advertising of any sort -- to point out any positive thing, no matter what, you advertise.

Q So you rely on Billboard to tout your own products when you are doing well in Billboard?

A When you talk about gold records, sure.

MR. GRUMBACH: I object to the form of the question.

THE COURT: What is the question.

(Question read.)

THE COURT: Overruled.

Let us take a short break.

(Recess.)

Q Mr. Zimmermann, have you ever spoken to any customer or consumer who watched the Roots commercial?

A Not directly, no, I haven't.

MR. SCHURTMAN: I have no further questions.

MR. BERGEN: First of all I wonder if he could have Mr. Zimmerman identify the commercial. I guess the easiest way would be to make this as CZ.

(Defendants' Exhibit CZ was marked for identification.)

Q Mr. Zimmermann, I show you a document, a box that has been marked and ask you if you can identify that?

A Yes. This is a cassette we made to include the four running commercials which have been previously produced.

Q And the four commercials are Mind Games, Walls and Bridges, Rock and Roll and Shaved Fish.

MR. BERGEN: Your Honor, if I might just play the commercials. Because they are going to come through the machine later on.

MR. SCHURTMAN: I don't know what is the relevance of these commercials.

THE COURT: You mean for all these albums?

MR. BERGEN: Your Honor, the relevance is that

Mr. Lennon's counterclaims one of the things he has complained about is that the Roots commercial was not up to his standards and I would like to show the Court four commercials for Mr. Lennon's albums and Mr. Lennon tomorrow will testify as to what role he played in those commercials. They asre very brief, they are 30 seconds each.

MR. SCHURTMAN: Is that supposed to establish a basis for damages? And if so, how?

MR. PRETTYMAN: Can we argue that later?

MR. SCHURTMAN: I would like to know what the relevancy of the offer is.

THE COURT: We have gotten this thing of comparing the Roots album with his albums and I would think by the same token, we can compare the commercial with his own commercials. Isn't that an issue in the case?

MR. SCHURTMAN: I don't think it is, but if you want to accept it, I will object to it for the record.

MR. BERGEN: The other point is that --

THE COURT: I will approve it. Television set playing.

MR. BERGEN: Now the first one is from Mind Games. It takes a minute to get to it.

MR. BERGEN: The next one is for Walls and Bridges.

(Television playing.)

MR. BERGEN: The next one is the Rock and Roll commercial.

(Television playing.)

MR. BERGEN: The last one is for Shaved Fish.

MR. SCHURTMAN: Were these all made by Braverman Productions?

MR. BERGEN: No, I don't think they were.

MR. SCHURTMAN: Rock and Roll was.

MR. BERGEN: Some of them were.

MR. SCHURTMAN: Am I correct that Rock and Roll was made by Braverman?

MR. BERGEN: Yes.

THE COURT: I don't have any particular memory of the Rock and Roll, of the Roots commercial. Have you got that around?

MR. BERGEN: We have it right here.

(Commercial played on the television.)

MR. SCHURTMAN: Mr. Bergen, are you objecting that our commercial did not show Mr. Lennon sticking his tongue out to the audience?

MR. BERGEN: I don't have any objection to the commercial. It is in evidence. Your Honor, I offer the four commercials.

THE COURT: Mr. Bergen just made a concession.

MR. BERGEN: I offer the four Capitol commercials.

THE COURT: All right. I will receive them.

MR. PRETTYMAN: Your Honor --

THE COURT: Yes.

MR. SCHURTMAN: Are we going to show that Roots commercial again for any purpose? I want to know if we need the machine.

THE COURT: I don't think so. I have seen that twice now.

MR. SCHURTMAN: Let me simply point out so there is no confusion later, that on that commercial, there is no reference to any authorization by anyone. That becomes an issue.

THE COURT: I assumed that, yes.

MR. GRUMBACH: May we also let the record show that there are also 10 or 15 additional photographs of Mr. Lennon that don't appear on the album cover that do bear on the commercial.

MR. PRETTYMAN: Your Honor, I would put my last witness on, Mr. Posner.

MR. BERGER: I have got a couple of more

questions.

MR. PRETTYMAN: I am sorry.

THE COURT: Just two.

BY MR. BERGEN:

Q Mr. Zimmermann, you testified the last time we were together, I think on the 18th of March, in response to some questions by Mr. Schurtman about the reviews with respect to this album.

A Yes.

Q Mr. Schurtman was making the point that the reviews of the Lennon Rock and Roll record were not good reviews. Do you recall that?

A Yes, I do.

Q Have you ever heard of a rock group called Grand Funk Railroad?

A Yes, I have.

Q Did they used to be under contract to Capitol Records?

A Yes.

Q And isn't it true that during the early years like the first three years of their career, with Capitol, Grand Funk Railroad got universally bad reviews on their records?

A Absolutely.

MR. SCHURTMAN: Object to that as leading.

THE COURT: Overruled.

Q And isn't it true also, that --

THE COURT: Well, you tell it. I think I will sustain the objection, but you are acquainted with the nature of the reviews, are you?

THE WITNESS: Yes, sir.

THE COURT: What kind of reviews were they? Give us a little --

THE WITNESS: They were negative and in the strongest sense of the word. I don't recall seeing one favorable review in the first three years. And there were tons of what could be normally called as bad press.

However, our feeling was that it was press.

Q And what about the groups ability to get their records played on the radio?

A It was very limited. There was very little appeal, or very little interest particularly from the top 40 radio stations, even the more progressive FM stations really didn't get a lot of air play with the group at all.

Q In the first three years of their career did Grand Funk Railroad ever have a hit single?

A No.

Q Isn't that very unusual for a record -- a group?

A Yes, it is.

Q And what were the sales of Grand Funk Railroad, their first seven or eight albums?

A I think the first, if memory serves me right, was 7 or 800,000, and the subsequent albums were all over a million.

Q So that during the period when they were getting bad reviews and they couldn't get any of their singles played on the radio, they still had million record sales?

A Yes, they did.

Q Now, one last question.

Assume that you have two record albums for the purposes of my question. The same quality, recorded by the same musicians in the same studio. And one of those two records, and one of those record albums is recorded by an unknown artist with the same ability as John Lennon, and the other by John Lennon. Would Capitol in your opinion pay more for the John Lennon album than the one by the unknown artist?

A Absolutely.

Q Why?

MR. SCHURTMAN: Pay who more?

MR. BERGEN: Pay Mr. Lennon or the unknown artist.

MR. SCHURTMAN: Pay greater royalties?

Q And why?

A Mr. Lennon being an artist of great stature, an ex-Beatle, having a substantial track record, being extremely well known gentlemen, musically and by the public and in the most general terms, the album would be much more successful. The chances of its success would be much more enhanced.

Q Can you tell the Court how much more Capitol would pay approximately?

A A great deal more.

MR. SCHURTMAN: Your Honor, I don't understand.

MR. BERGEN: I have no further questions.

THE COURT: I don't know what that has to do with anything.

MR. BERGEN: It has a lot to do with the case because John Lennon's name and his ability asre worth a lot more than an unknown artist of even the same stature, I mean the same ability as Mr. Lennon and I think that goes to what Mr. Lennon's name is worth and what the damages would be towards the unauthorized use of his name in putting it on a record. It is a record he did not personally authorize.

MR. PRETTYMAN: In other words, that the value doesnt go solely to the quality of the performance.

THE COURT: All right.

BY MR. SCHURTMAN:

Q Do you know what royalties were being paid to Mr. Lennon?

A I don't think I am free to state that.

Q Feel free unless the Court --

MR. BERGEN: I am going to ask Mr. Posner what the royalty was.

MR. PRETTYMAN: He knows in detail.

MR. SCHURTMAN: Why ask this witness about comparative royalties if he doesn't know the answer?

MR. PRETTYMAN: He is saying regardless of what the royalty was they pay more for Lennon than anybody else.

THE COURT: There were no figures given. It is all very vague.

MR. SCHURTMAN: I move to strike the testimony as meaningless.

THE COURT: No, I won't strike it.

Anything else?

MR. SCHURTMAN: I have some cross examination.

MR. PRETTYMAN: I'm sorry.

BY MR. SCHURTMAN:

Q Why did you pick the Grand Funk group as your particular illustration in the last set of answers?

MR. BERGEN: I picked them. I aksed the

questions and I suggested the name of the group.

MR. SCHURTMAN: I know. But the witness gave the testimony.

Q Why out of tens of thousands of records and groups and so on did you pick that particular one? I am just curious.

MR. GRUMBACH: Your Honor, I responded to a question about the Grand Funk Railroad. I think Mr. Schurtman's question is improper.

THE COURT: Maybe it was done, maybe it was selected in consultation. Do you know why the Grand Funk group was picked originally for illustration purposes?

MR. BERGEN: Your Honor, it wasn't picked in consultation. I can make that representation.

THE COURT: Why don't we let the witness testify. We have got a witness and if you want to get on the stand and Mr. Grumbach wants to get on the stand, you are free to. We have got Mr. Zimmerman. Okay, let's go.

Q I think it is undoubtedly Capitol is the most familiar with Grank Funk of any label. They recorded with Capitol a good number of years. So that -- and we had some strategies to cope with in overcoming and then overcome them. The lack of air play and critical reviews and we could have picked on some other acts too that in my

experience have received quite poor reviews from critics. And who have had very successful albums.

Q And could you have also picked out reverse situation acts that had good reviews and sold well?

A And acts that had good reviews and sold very poorly.

Q Okay.

THE COURT: Anything more from this witness?

MR. SCHURTMAN: I have nothing else.

THE COURT: All right. You may step down.

Do you have anything?

MR. PRETTYMAN: No. I mean nothing more from him.

MR. SCHURTMAN: Your Honor, may I ask one thing? All these things that they suposedly did for the Rock and Roll album on the TV commercial the T-shirt advertisements, the posters, do we have samples of these available? I wonder if I could see them at some point.

MR. SCHURTMAN: Will the witness still be available?

MR. PRETTYMAN: He will be here for another hour,your Honor, I will have only one more witness, Mr. Posner in my case. However, I wikl be relying upon some evidence that will be put in by Mr. Bergen as part of his

CASE. My difficulty is that as you know, I cannot be here tomorrow and Mr. Sol Granett will be conducting the examination of Mr. Posner if we do not finish him tonight. I was wondering in regard to attorney's fees, whether I should submit mine at this time at this time in view of the fact that I will not be available later. I don't know whether he wanted to cross examine me or not. I have submitted to you not only the detailed data in regard to time slips, but I have called Mr. Kanzer and asked if he wanted to see the underlying data in regard to disbursements.

He said that he would not, but he said it would be sufficient if I brought them along to the courtroom, which I have done.

I also have the data sheets on all of the people in the office who have worked on the case as I indicated in my supporting memo.

MR. SCHURTMAN: May I respond to that last point. Judge,on the issues of attorney's fees I think you indicated that you would have to first make a legal ruling as to whether attorney's fees are appropriate at all in light of the Alyeska case and a lot of other matters, and I think at some point we should argue that issue before we get into detailed evidence. If your Honor should decide and I think you will in the light of the cases, that attorney's fees are

hbbr

appropriate under the Lanham Act, then the next question would be what portion of the attorney's time is devoted to work on the Lanham Act issue. Because as a rule there is a similar problem in antitrust cases. For instance, ask for attorney's fees, you don't get them in connection with work you perform in seeking a preliminary injunction.

THE COURT: I will say this: And I would like to save your time as much as possible obviously but I think theonly way to approach this is to get the proof in on the basic merits of the claims and then --

MR. PRETTYMAN: Sure.

THE COURT: -- see how we handle the attorney's fees. So I would appreciate --

MR. PRETTYMAN: I am not pushing it at all. I just want to make myself available.

THE COURT: I appreciate that.

I think we ought to go ahead with Mr. Posner.

MR. PRETTYMAN: I call Mr. Posner.

H A R O L D P O S N E R, called as a witness by Defendant Capitol Records, having been first duly sworn, testified as follows:

THE COURT: What is your full name?

THE WITNESS: Harold Posner.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Posner, what is your position at Capitol?

A I am the director of financial planning and analysis.

Q How many years have youbeen with Capitol Records?

A 18.

Q What was the position you held whenyou first came with them?

A I began in the marketing division.

Q And how long were you in the marketing division?

THE COURT: When did you first come, please?

THE WITNESS: 1958.

THE COURT: You started in the marketing division?

THE WITNESS: Yes, sir. I was there for about -- to the early '60s in various capacities and was transferred then to the finance division in profit planning as a financial analyst specializing in marketing, sales, pricing

and things of that nature. In 19 -- I guess it is '67 or thereabouts, I became the director of financial analysis for the United States record business. In 1969, I became the corporate director of corporate planning which was an activity involved in acquisition growth strategies. In 1972, I became the director of the corporate financial planning and analysis activity which I still hold.

Q Can you tell us just in a few brief sentences what your job entails? What is it you are in charge of?

A In the financial planning area, we do such things as long range planning, annual budgets, three month forecasts, monthly quotas. We evaluate all Capitol expenditures. We review and evaluate all cost and expenses for all activities. In the financial analysis area, we do all evaluation of all you might say the major or significant artist negotiations, artist profitability. We review all pricing changes, all sales programs. I really shouldn't say all. Anything that was of significance. And I guess you would say most activities that would not be of a routine nature and a common function.

Q Did there come a time in early 1975 where you received a request in regard to pricing in regard to the Rock and Roll album?

A Yes, there was.

Q And, who made that request of you?

A Well, it came about this way. Mr. Mennon called from New Orleans and asked if I would do the following: Contact Don Zimmermann and get his best sales estimates of what he thinks the Rock and Roll album would see if we rushed it out under the competitive circumstances that we have been talking about here and also to make an estimate quickly as to what we thought the distribution profit would be if we priced it at 5.98 and that by the way means a tape, the tape counterpart would be at 6.98.

MR. PRETTYMAN: Mark this DA.

(Defendants' Exhibit DA was marked for identification.)

Q Did you make the request of Mr. Zimmermann?

A Yes, I did.

Q And what was his response?

A He said that he would forecast that we could sell 300,000 units on what we called the low forecast, 400,000 at the mid, and 500,000 at the high.

Q Did he explain to you or was it necessary to explain to you whether the 500,000 was in fact the highest anticipated sales for that album?

A I can't remember whether we actually listed it then. But I can tell you from experience what we do all the

time. I am sure without actually maybe having said it at that moment this is how we react. Our high side is never an extreme high. Obviously, many albums sell higher than what would cause a reasonable high projection. It is really with an act lik maybe Mr. Lennon high could be very high like some of his albums have been and the low side isn't absolutely the low. The l. est low could be zero. But it is what you expect the risk we would be taking if the album did rather poorly.

Q All right. Did you thereafter write a memorandum to Mr. Lennon in regard to this subject confirming, well, first of all, did you give Mr. Lennon information over the phone in response to his questions?

A Yes, I did.

Q And did you thereafter confirm the information in writing thatyou had given to him on the phone?

A Yes, I did.

Q I show you Defendants' Exhibit DA for identification and ask you if that is a copy of the memo that you wrote to him?

A Yes, it is.

Q All right.

Would you explain the figures on this exhibit first, it says --

MR. SCHURTMAN: Before he explains are you offering it in evidence?

MR. PRETTYMAN: I am terribly sorry, I apologize.

MR. SCHURTMAN: Mr. Prettyman, when did you find this memo, because I haven't seen it up to this time either.

MR. PRETTYMAN: Was it the last time or last night?

THE COURT: I don't know when you found it.

Q When did you find it?

A I found it a year and a half ago and I --

Q Did anybody ever make a request to you for a document of that kind?

A Yes.

Q And did you furnish it?

A Yes.

Q And who did you give it to?

A Mr. Carp.

MR. PRETTYMAN: Then the only explanation I have is that it is among the set that had the picture in it that was lost.

MR. SCHURTMAN: Your Honor, all I can tell you is that I am walking into this trial without the benefit of any discovery on the issue of damages. I have been given nothing and Mr. Prettyman keeps coming up with documents.

I don't doubt his explanation, but what has been going on here?

THE COURT: Let me just talk to someone for a moment.

(Pause.)

MR. PRETTYMAN: Your Honor, I think the point is validly taken on this one. I distinguish this from the other which we have just found and in view of the fact that he had found it before and given it to Mr. Carp, we do know that one packet went to New York. But I would withdraw the exhibit, because I don't think it is fair at this stage I do think I am entitled to ask the verbal information that he gave to Mr. Lennon as a result of the request. That has already been testified to by Mr. Lennon but I would just like to have him confirm it.

3b pm1 hb:mg 1

MR. SCHURTMAN: Well,your Honor, I have a basic objection to all of this evidence on damages -- when we asked questions in discov ery, we were not given information, so, you know, you have asked me why is my cross-examination so, shall we say, sweeping, one reason is because I haven't had a chance to prepare.

I hear all these things for the first time in the courtroom and I am doing the best I can.

MR. PRETTYMAN: Your Honor --

THE COURT: We could go back over, but I think, I assume, and you correct me if I am wrong, that you have been apprised for some time that they would claim a loss of sales frcm sales with respect to the Rock and Roll album; right?

Now the new claim or the thing you said was a new claim, that was not posed in Mr. Menon's answer to that deposition question, was it? Was that the reduction in price?

MR. SCHURTMAN: That is not my point now.

THE COURT: All right.

MR. SCHURTMAN: My point is that on any of the damage claims, whatever they may be, we did ask for information relating to them. We didn't get anything. That is my point.

hb:mg 2

Now a memorandum like this, for example, or even the man's testimony, we just got nothing.

THE COURT: Look, my only answer to you is this, that if you have a problem about presenting your case or cross-examining witnesses or anything else that relates to your inability to have discovery, or-- I can work that out. I can grant you time. I can recall witnesses. I can do anything that is sensible.

But I didn't understand that to be the problem with the other man. I won't go back over that now.

Please just let me know if you need something and I will try to help you out.

MR. SCHURTMAN: My basic objection is that you should preclude evidence on issues as to which we made discovery demands and did not get any responses.

MR. PRETTYMAN: Your Honor --

MR. SCHURTMAN: That is the type of ruling you had originally made in the first trial, when the shoe was on the other foot. You later changed it because of other circumstances. Now if you won't make that ruling, then I do ask for more time to rebut some of the points that are being made.

THE COURT: Now look, Mr. Schurtman, you see, just a general statement;you asked for preclusion order on things

hb:mg 3

we haven't had discovery on. I can't deal with that.

MR. SCHURTMAN: All right, I will take out the specific discovery demands and I will show you the specific responses. And I will show you that up to now, up to the time this hearing began, and even up to today, we just have not gotten any information from the other side as to the details of what they were claiming.

MR. PRETTYMAN: Your Honor, may I say that if Mr. Schurtman had been at the depositions, I am certain he would be aware of the extraordinary amount of discovery that went into this case and the extraordinary number of documents which we produced, and at one point, when he asked merely for an identification of documents, I even presented the entire documents themselves, even though they were not called for;instead of just identifying them, I gave him the documents.

There has been a tremendous amount of production inthis case. It is just not accurate to say that there has not been production.

Now obviously you have a tremendous problem when youare dealing with a company like Capitol, with a number of people involved and over this period of time, in attempting to get every single sheet of paper, and when I have been able to come up with a sheet of paper that was found

hb:mg 4

subsequently, I have identified it.

On this one, this apparently was one that was found contemporaneously and was sent to the general counsel; that I was not aware of, and consequently I am prepared to withdraw it.

THE COURT: If you want to object to a specific question show me a place in the record where the information was requested in discovery, and show me that it was not furnished, then I can act intelligently on an objection. That is a painful process because, you know, it can take time,but it certainly can be done.

MR. SHURTMAN: I will dig it out.

THE COURT: Otherwise I think we have to go on unless we have the specifics. I don't know anything else to do.

MR. SCHURTMAN: Let me just ask Mr.Prettyman one point.

Do you contend that you have ever given us in advance of this latest hearing or up to the present time any documents or any information or any answers to interrogatories or depositions, spelling out your alleged lost sales, or your alleged lost profits?

MR. PRETTYMAN: I would have to go back and look at precisely the answers. But if you are talking about the

hb:mg 5

kind of question that you asked Mr. Menon in which he answered it as best he could without setting forth specific facts and figures, you are absolutely right.

We haven't, until this stage, been in the position to set out the precise dollar figures and I don't think we have to.

THE COURT: Did you ever ask --

MR. SCHURTMAN: Yes, we did.

THE COURT: Now look, it is five after five and the only way I can handle it is to go ahead,and frankly I recognize that we have discovery rules and I am just as intent as anybody else in getting cases prepared for trial.

But once we come to trial my interest is getting the facts, because I have a kind of an instinct that I would like as much as I am humanly capable of doing so, to write decisions or make rulings that have some basis in truth and justice and so I would like to get the facts out.

Now facts have a way of getting developed in the course of a trial. People realize the need of things they didn't realize before. It happens in every trial I have ever seen. And it is happening now.

On the other hand, if you come forward with a specific instance of a failure on the part of any defendant

to comply with their discovery obligations, I will entertain motions to strike. But that is the best I can do.

MR. SCHURTMAN: Fine.

THE COURT: Certainly I can help you in any way that is reasonable to give you time to meet anything that has come by surprise. Of course I will do that.

MR. SCHURTMAN: I appreciate that.

BY MR. PRETTYMAN:

Q Did you in fact reply orally to Mr. Menon in response to this question?

A Yes, I did.

Q And what did you tell him?

A I told him that based on the sales that Don Zimmermann gave us and our test estimates of costs related to this album we could in fact make a profit on all sales levels at $5.98.

THE COURT: What? You are going to have to speak up a little bit.

A That we could in fact make a profit on this album if we did release it at $5.98.

THE COURT: At any of the projected sales levels, you say?

THE WITNESS: Yes, sir.

(Defendant's Exhibit DB marked for identification)

Q I show you what has been marked DB for identification, Mr. Posner, and ask you what that is.

Was that prepared for this trial?

A It was prepared on March 24, which was last week.

Q All right. And what does it purport to show?

A Well, since I have been in pricing, in this job, we have had 620 albums, new popular albums released by Capitol, all at full price, which was the price in existence at that time except for two albums.

The first one was in April 1972 by a group called Raspberries, which was their first new album, and we never repeated that again until the Lennon album.

MR. PRETTYMAN: I move for the admission of this, your Honor.

THE COURT: Any objection?

MR. SCHURTMAN: No objection.

THE COURT: All right. Received.

xx (Defendant's Exhibit DB received in evidence)

A Since there is so much on this point, I would like to make a point that I noticed. In my opinion, having been through this for years, there is no question in this particular case whatsoever, as to whether we would have considered any other price other than $6.98 on this album. It would have been just like every other album we release,

if it had not been for the competitive album.

I would like to add one other thing. Capitol's basic objective is to make-- to maximize profits as best it can in the conduct of its business. And certainly if we had been able to release the album at $6.98, we would have done so because we would have made more profit.

MR. PRETTYMAN: Would you mark this DC.

(Defendant's Exhibit DC marked for identification)

Q Now, Mr. Posner, as I understand it, you have prepared ten different methods used ot project Rock and Roll unit sales in the United States; Is that correct, for purposes of this case?

A Yes, sir.

Q All right.

And is Defendant's Exhibit DC for identification a list of those different methods which you were about to testify to?

A Yes.

Q All right.

MR. PRETTYMAN: I move for the admission of this. I simply think it will help to follow along the ten methods which we are now going to introduce.

MR. SCHURTMAN: I object at this point. If the

witness wants to testify and explain what he did, fine. But all these --

THE COURT: May I see it?

MR. PRETTYMAN: That would be --

MR. SCHURTMAN: Until he explains it, we can use it for identification. But I would like to hear the witness' testimony.

MR. PRETTYMAN: It has been marked for identification)

Will you mark this Exhibit DD,please, for identification.

(Defendant's Exhibit DD marked for identification)

Q Now, does Defendant's Exhibit DD for identification relate to the first three items on what has been marked Defendant's Exhibit DC for identification?

A Yes.

Q And it covers each of those three items, 1, 2 and 3, on this one exhibit, is that correct?

A Yes.

Q All right.

Now will you take Exhibit DD for identification and tell us what it is, what it purports to do?

A The first three methods used were simply to take

Mr. Lennon's past sales history, and in the first case we took the average of his last five albums, which was 644,000 units.

Q I think I can cut this short, Mr. Posner.

Did you take, do you recall the testimony - - you were here when Mr. Zimmemann testified about a previous exhibit that listed these albums and these results and then did you take the result of his exhibit and convert that into these figures?

A Yes, I did.

Q All right.

So it is based,in effect, on Mr. Zimmermann's prior testimony and the exhibit that was introduced through him, is that correct?

A That is correct.

Q All right.

Now, if you will tell us what this purports to show?

A Well --

Q I see,for example. the 644,000, but what is that?

A That is simply taking the total sales of Mr. Lennon's prior five albums before Rock and Roll which on this exhibit says 3,220,000 units, and we divided it by five.

THE COURT: Well, that's all in Exhibit 110, isn't it?

MR. PRETTYMAN: Right.

THE COURT: Just a moment. I have to take a verdict in a criminal case. So if you could just let the attorneys in the criminal case come up, and we will bring the jury in, and take the verdict.

We will be right back.

(Recess)

THE COURT: All right.

MR. PRETTYMAN: Your Honor, I showed the promotional material to Mr. Schurtman. He indicates that he does want to ask Mr. Zimmermann a few questions about it.

Mr. Zimmermann is going back tomorrow so if it is acceptable to you, we will interrupt and have Mr. Zimmermann resume the stand.

D O N Z I M M E R M A N N, resumed:

RECROSS-EXAMINATION (continued)

BY MR. SCHURTMAN:

Q Mr. Zimmermann, your counsel has handed me an envelope containing assorted items: tee shirts, buttons, post cards, and what have you.

Are these the items that are referred to in Defendant's Exhibit CX?

A Yes.

Q You said something about four color and two-color

process?

A Yes.

Q We can't remember your exact testimony; in connection with what did you give that testimony?

A That we would normally do a four-color ad. In this particular case we were only able to do two-color.

Q What other colors would you have added in a four-color ad?

A I am really not sure at this point but I am sure we do a great deal of four-color advertising for important albums, and we did not have the chance to consider what else we could have done. Time being --

THE COURT: I will tell you this doesn't mean a lot to me because I don't see any of this. Have you got the ads or whatever you are talking about?

Are you going to mark these for identification or in evidence or what are you going to do?

MR. SCHURTMAN: I will offer them all in evidence and then I am going to ask the witness one question.

THE COURT: Can they be offered as one exhibit in that sack?

MR. SCHURTMAN: I think so.

THE COURT: That's a good thing. Why don't you have that marked as an exhibit, with the next plaintiff's

exhibit number.

MR. SCHURTMAN: I will offer the envelope as Plaintiff's Exhibit 235.

This is an envelope that was handed to me by Mr. Prettyman which contains various magazine advertisements, a Rolling Stone advertisement, a post card -- what would you call this?

THE WITNESS: That is a picture of the billboard on the Sunset Strip in Los Angeles.

MR. SCHURTMAN: A picture of the billboard on Sunset Strip in Los Angeles, a button with a safety pin, a tee shirt.

What would you call this?

THE WITNESS: That is a press kit.

MR. SCHURTMAN: A press kit. A poster. And a radio spot.

(Plaintiff's Exhibit 235 marked for identification)

THE COURT: The radio spot is the little white box?

MR. GRUMBACH: It is a tape recording.

Q It is a tape.

I take it these are all the items that were listed in your promotional plan?

plan?

A Yes.

MR. SCHURTMAN: Let me offer them collectively.

MR. PRETTYMAN: I didn't see a sticker in there, for example.

THE WITNESS: There is a sticker.

MR. SCHURTMAN: Whatever you gave me.

THE COURT: You have listed them. We can compare it.

MR. SCHURTMAN: I think I have listed it. I offer all that as Plaintiff's Exhibit 235.

THE COURT: Any objection?

MR. PRETTYMAN: No objection.

THE COURT: All right. Received.

You are going to use them in questioning?

MR. SCHURTMAN: Yes, I have a couple of questions on them.

Q Now, which of these items, Mr. Zimmermann, would have had more than two colors?

A Primarily the trade and consumer ads wouldhave had some kind of color background or color script or graphic added to draw more attention to them.

Q You have done that in all other cases?

A In most cases, yes, of artists of this stature.

Q All right.

Now, at the risk of being repetitive, can you tell the Court how the alleged delays with respect to any of the items that we have just offered or the fact that you only had two colors instead of four colors, to what extent did they hurt your sales?

Can you quantify that at all?

MR. PRETTYMAN: Your Honor --

THE COURT: At the risk of repetition is an understatement.

MR. PRETTYMAN: We have been through that three times.

MR. SCHURTMAN: Let him say no, if he can't.

THE COURT: Is there anything you can tell us now that you see the physical objects before you on the subject of Mr. Schurtman's question that you have not already told us? Anything you can add?

THE WITNESS: I don't think there is anything I can add, your Honor. I think I have covered it pretty thoroughly previously.

THE COURT: All right.

MR. SCHURTMAN: All right, I have no further questions.

(Witness excused)

H A R O L D P O S N E R, resumed:

DIRECT EXAMINATION (continued)

BY MR. PRETTYMAN:

Q On Defendant's Exhibit DD for identification, what are these figures in the right-hand column beside the circled figures?

A The 1, 2 and 3 -- it says No. 1 and No. 2 and No. 3, and it referred to the recap sheet that you have so you could trace back to No. 1, 2 and 3.

Q What are these figures over on the right here?

A Oh, on the right? Simply the number of unit sales that the albums in the sample total divided by the number of albums to get the average which is on the left.

Q All right.

Now did you find one error on the previous exhibit?

A Yes, we did.

Q And has it been corrected here?

A Yes.

THE COURT: You're talking about 110?

MR. PRETTYMAN: Yes.

THE COURT: What is that?

THE WITNESS: It is the figure that -- for Shaved Fish on the right and if you see, it is-- it has an asterisk

next to it and it says "corrected on DD."

MR. SCHURTMAN: Mr. Prettyman, I thought we changed that figure again this morning to 480,000.

MR. PRETTYMAN: You mean the figurs that were added at the bottom?

MR. SCHURTMAN: You have corrected Shaved Fish from 456 to 434 and this morning we changed Exhibit 110 to reflect 408,000 -- I think the judge wrote that in.

MR. PRETTYMAN: But that was a subsequent date. This exhibit was the exhibit that was in at the time and we brought up to February as a result of something that yousaid but this was done in the meantime -- this exhibit was done in the meantime.

MR. SCHURTMAN: But it says through February.

All right, do it your way.

THE COURT: Can I see Exhibit 110 as it now stands, the exhibit? Where is Exhibit 110?

MR. PRETTYMAN: Let Mr. Posner explain.

THE COURT: I don't see any asterisk or correction in 110 at all.

MR. PRETTYMAN: Would you let Mr. Posner explain it?

THE WITNESS: First, may I see 110?

THE COURT: Sure.

THE WITNESS: All right. We have three things to discuss. 110 was a document that was submitted to the Court, I guess a couple of weeks ago.

THE COURT: Right.

THE WITNESS: And when I went back after, we found out that the Shaved Fish number should have been 434,000 units through the end of February 1976. That is what was on the typed document that we now call DD.

THE COURT: I guess I don't have DD.

THE WITNESS: The typed document is the identical document I guess as 110 except for that one number.

THE COURT: All right. That's fine.

THE WITNESS: Then the next point I think which Mr. Schurtman is bringing up is that yesterday, or this morning, newer numbers going through the end of March, or at least March 26 on Shaved Fish,and that shows instead of 434,000, it now shows 408,000 and the reason, of course, being that returns exceeded sales in the month of March.

BY MR. PRETTYMAN:

Q So that the reason the 408 is not on Exhibit DD, I take it, is that DD was prepared before the March figures became available on this group?

A Correct.

Q All right.

MR. PRETTYMAN: Now I offer Plaintiff's Exhibit DD for identification into evidence.

MR. SCHURTMAN: Qustion No. 1, why did you decide to start this exhibit in December 1970. What about the prior albums?

THE WITNESS: If you are referring to the prior albums that were brought up this morning, I simply asked our people to get the prior John Lennon albums that we called "John Lennon-Capitol Albums," and get their sales

history. These other albums are not classed as John Lennon Albums.

MR. SCHURTMAN: In what?

THE WITNESS: Well, I really --

MR. PRETTYMAN: Don't testify to anything you don't know about.

THE WITNESS: I was just going to say I really can't give you the legal difference between this --

MR. SCHURTMAN: I am not asking for any legal difference. All I am asking you is who directed the manner in which this exhibit should be prepared?

THE WITNESS: I did.

MR. SCHURTMAN: And my next question is: Why did you decide that you direct the man to exclude --

THE WITNESS: I didn't decide--

THE COURT: To exclude what?

MR. SCHURTMAN: The three earlier Lennon albums. Lennon has been recording on his own since 1969.

THE COURT: You are talking about the three we had this morning, Wedding Album --

MR. SCHURTMAN: Yes.

THE COURT: The Plastic --

MR. BERGEN: Live Peace in Toronto, your Honor.

THE COURT: Let me get this.

What are the ones you are referring to so I am clear?

MR. SCHURTMAN: I am reading from a trade industry list on 2/8/69. He recorded Two Virgins, released Two Virgins.

6/28/69 Lennon released Unfinished Music No. 2, Music with the Lions.

12?13?69 he released Wedding Album.

1/10/70 he released Live Peace in Toronto in 1969.

12/26/70 he released John Lennon Plastic Ono Band which is the first one on this gentleman's list.

And my question is -

THE COURT: Well,you have got four before the --

MR. SCHURTMAN: Right.

Now why weren't those included?

MR. PRETTYMAN: My difficulty on this, your Honor, is that I don't have a witness here to explain this. I know what the facts are as to why the difference. But I don't have a witness here. I will just have to handle that as best I can in terms of getting some testimony in, I suppose.

But these are, in the first place, these dates are wrong that have just been given and, secondly, that's at least two out of the three and I think perhaps all three of these albums are more, were considered more of the Two

Virgins variety which he concedes should not be included than otherwise.

MR. SCHURTMAN: Which who concedes?

MR. PRETTYMAN: You didn't want us to count Two Virgins.

MR. SCHURTMAN: I think you ought to count everything or nothing.

MR. PRETTYMAN: We didn't sell Two Virgins. That was put out by somebody else.

MR. SCHURTMAN: I am not going to argue but Wedding Album and Live Peace in Toronto bear regular Apple catalogs. In fact all three do.

THE COURT: What are the ones you say should be included in any compilations?

MR. SCHURTMAN: I think all four should be. But at a minimum you should include Zapple, 3357, it's got a Z in front of the Apple, Apple 3361 and --

THE COURT: Well, the numbers. You are talking about the Two Virgins, right?

MR. PRETTYMAN: No.

THE COURT: He just told me he did.

MR. PRETTYMAN: Do you contend the Two Virgins should be included or not? Put out by a different company?

MR. SCHURTMAN: But it is a Lennon album.

MR. PRETTYMAN: All right, I just wanted to --

THE COURT: These names go fast. You claim that the Two Virgins should be in, right?

MR. SCHURTMAN: Two Virgins should be in.

THE COURT: Unfinished Music?

MR. SCHURTMAN: No. 2, that's the title.

THE COURT: And then the Wedding album?

MR. GRUMBACH: Which is Exhibit 227.

MR. SCHURTMAN: And Live Peace in Toronto --

MR. GRUMBACH: Which is Exhibit 229.

MR. SCHURTMAN: Two Virgins was not distributed by Apple for reasons which your Honor has heard.

The next one was, it's Zapple --

THE COURT: Well, don't --

MR. SCHURTMAN: If you will look at these numbers they follow in sequence. On 110. It is 3357, Wedding Album is 3361, Live Peace in Toronto 1969 is 3362 and then the next one is Plastic Ono, which is 3372.

All I am really asking is why in making these averages which are supposed to have some significance, why leave out certain items?

THE COURT: That's the question.

MR. PRETTYMAN: My problem is I don't have the witness who can give the reason, that's the problem.

THE COURT: Except this is the witness who decided, according to his testimony, to make the compilation in Exhibit 110.

Why doesn't he know the basis for his selection?

MR. PRETTYMAN: I don't think he asked -- I think he simply asked to give the Lennon albums and that he was not in on the decision of why these three albums were not among the Lennon albums.

That's theproblem,as I understand it. Am I right, Mr. Posner?

THE WITNESS: Sure. If I had asked anybody at Capitol to go back and get the Lennon albums, this is what they would have picked.

MR. BERGEN: Your Honor, if it is any help, I believe that tomorrow Mr. Lennon will be able to explain at least from his standpoint why these albums are different.

MR. PRETTYMAN: These are in different categories.

THE COURT: Maybe Mr. Lennon can do that. But Mr. Schurtman asked a question and you are telling me you ultimately don't know why there was a selection of these albums, is that right?

THE WITNESS: No, I can't say I don't know. The girl works for me. I simply said, "Get the sales history

on the prior Lennon albums." In our terms, the prior Lennon albums happen to be the albums that are Apple, Beatles, Lennon albums.

THE COURT: Then you pursue it, Mr. Schurtman. You are examining -- no, wait a minute, who is examining? You are examining on voir dire.

MR. SCHURTMAN: I simply object to the exhibit as being an incomplete exhibit, and since he is basing averages on incomplete figures, I don't think --

THE COURT: Well, the way to handle it -- if other figures -- these have got some figures. Now the conclusion as to what the proper average is I will have to draw. But we have already got 110 in.

I will permit Exhibit DD. The weight of it is obviously a matter of question.

MR. PRETTYMAN: I would suggest that the way to handle it is that we either have a proper explanation as to why those items were not included or we have the figures if they are available for those albums. One or the other. I think you will be satisfied as to why we didn't consider them --

THE COURT: All right.

Q All right, Mr. Posner.

MR. PRETTYMAN: Would you mark this Exhibit DE,

please.

(Defendant's Exhibit DE marked for identification)

MR. GRUMBACH: Your Honor, is DD now in evidence?

THE COURT: Yes.

(Defendant's Exhibit DD received in evidence)

Q Mr. Posner, does Capitol make forecasts of what it believes its artists are going to do when it prepares its figures for the next fiscal year?

A It certainly does.

Q And when would those estimates have been made for fiscal 1975?

A In the spring of calendar 1974.

Q And does it in fact make an estimate of specific albums that it is aware of at the time will be coming out during the next fiscal year?

A Yes.

Q And was such an estimate made for fiscal 1975?

A Yes.

Q Did you participate in any way or were you responsible in any way for the preparation of these kinds of figures?

A Yes.

Q I show you what has been marked Defendant's Exhibit

DE for identificationand ask you what it is, and also I am going to ask you what information has been taken out because of confidential purposes (handing).

A When we bill the official profit budget for the next year, we start off with sales, and we go through all of our artists that we have under contract and we identify each artist that we think we are going to release next year, the number of albums that we would like to release next year. We go through their sales history and their trend.

The sales people do this in conjunction with people in financial planning.

To come up with the most realistic unit sales that we expect for each of the albums, we put in next year's budget,and then we go on to finish the budget process by applying costs and ending up with a profit to see -- it becomes the ofificial target for the company for the entire year.

Q In this exhibit No. 12 is listed as John Lennon. What album does that refer to?

THE COURT: This is Exhibit DE?

THE WITNESS: Yes.

MR. PRETTYMAN: Yes, DE.

THE COURT: What is Exhibit DE? Is it a budget,

a forecast--

THE WITNESS: It is the second page of a document that says "Fiscal 1975 Budget for the U. S. Record Business." And in it we listed what we call the key artists, those artists that sell at least 100,000 units per album.

So this list has a listing of those artist and the number of albums it hoped to get and the units that we hope toget and budgeted for in John Lennon.

Q Now my question was, however, on No. 12, where it says John Lennon, what album is that referring to?

Q At that time, to the best of my recollection, we knew that John Lennon was working on an album to be released in the future called Rock and Roll.

MR. SCHURTMAN: What time was that?

THE WITNESS: This would have been, to be specific, sir, the date of this document is February 28, 1975.

MR. SCHURTMAN: '74.

THE COURT: February 28 what?

THE WITNESS: Thank you for the correction. 1974, that is correct.

Q My point is, this doesn't relate to some other album, does it?

A No. At that time -- sometimes we have an idea what's coming up and sometimes we don't. At that time it

was to be Rock and Roll.

Q And what is the 750,000 next to it?

A That was our realistic estimate that we were willing to put into our budget as what we expected to sell next year.

Q And what is the 2.7?

A If you multiply times the sales price per unit we get $2,700,000.

Q Now, the number 4--

THE COURT: What per unit sale price?

THE WITNESS: That would have been about $3.54 or .55 or .56 average.

Q Now has the rest of this material on this page--

THE COURT: I am sorry, just what was that figure again?

THE WITNESS: $2,700,000.

Q Has the rest of this page been blocked out purposely by you, Mr. Posner?

A Yes.

Q Is that because it contains confidential information relating to other albums?

A Yes.

Q Now the No. 4 next to the John Lennon figure, was that on the exhibit originally?

A No. I put that on so that if you had the recap sheet that's the fourth way we - the fourth number we used in the different alternative methods.

THE COURT: All right.

MR. PRETTYMAN: I offer Exhibit DE in evidence.

MR. SCHURTMAN: Your Honor, I object to Exhibit DE on the grounds that it doesn't contain any comparative information. They simply singled out one projection and the last time we specifically told Mr. Prettyman that the projection of 750,000 standing by itself is meaningless unless you know what they projected for other albums --

THE COURT: No, Mr. Schurtman, we have already had testimony that they projected 750. This doesn't add a thing. It doesn't subtract a thing. It gives us a paper that has it in.

MR. SCHURTMAN: It gives it an aura of respectability.

THE COURT: I don't decide things on auras. I don't care whether I have this or not.

MR. SCHURTMAN: Your Honor, are you going to --

THE COURT: I will receive it.

Look, we don't have to argue about this. There are all kinds of pieces of evidence here about what one could have expected the album to sell had it not been for

these events.

Now, it seems to me that Capitol has a hard job in proving such a thing, and you know there wasn't a test run under different circumstances to accumulate data, and they have to do the best they can.

It may not add up to much or it may add up to a lot. But I have got to let them put in the bits of information that they can.

MR. SCHURTMAN: Your Honor, let me state that on cross-examination I intend to ask the witness for the other projections and for projections for comparable albums --

THE COURT: Those are good questions.

MR. SCHURTMAN: And if I am going to be met with argument that"this is confidential information, we won't give it to you," then I will ask you to strike this exhibit.

THE COURT: You won't be met with that argument, or at least I won't sustain the argument.

I asked the question of a witness at the last hearing. I would be interested in that information. We have got to take it one step at a time.

I will overrule the objection and receive the exhibit.

(Defendant's Exhibit DE received in evidence)

MR. PRETTYMAN: Your Honor, it places me in a very

difficult position in terms of confidential information because there is just simply going to be nothing that is more valuable to the company or that other people, competitors, are going to want than sales of these individual albums--

THE COURT: No, wait a minute.

What I think, subject to what Mr. Schurtman brings out and argues, the thought that occurred to me last time when your witness testified about the 750,000 projection versus what actually occurred, which is sales of 342 -- now the thought that occurred to me and I don't think it was any stroke of genius, was that, well, it would be nice to know what the projections had been for Walls and Bridges, Mind Games and so forth.

Were they also 750 ending up with only 300,000 or 400,000?

MR. PRETTYMAN: I see what you mean.

THE COURT: But I don't have any intention, I don't think it would be terribly relevant to go around and get all the sales figures and projections for all these other than John Lennon albums.

MR. SCHURTMAN: Well, your Honor, let me respectfully differ. Take, for example, Helen Reddy, Grand Funk, if they made a projection of 750,000 for Grand Funk and they sold 350,000, I think that would be terribly relevant

cam:mg 15 Posner-direct

because it would show that these projections are meaningless. They could have projected ten million.

THE COURT: Why don't we start with the things most directly involved?

I can get an idea of the nature of this 750,000 figure, it seems to me, with one or two examples, and why not take them of the John Lennon in but let's cross that bridge when we get to it.

MR. PRETTYMAN: I just want to point out that that particular figure was not made in any way in contemplationof this case or something. It was for a very business-like purpose.

THE COURT: Of course it was.

All right.

MR. PRETTYMAN: All right.

Would you mark this Exhibit DF, please, for identification.

xx (Defendant's Exhibit DF marked for identification)

Q Now, Mr. Posner, this is a little bit more complicated. Would you take Exhibit DF and explain to us as best you can, sir, exactly what it is and what it purports to show (handing)?

A Well, I was trying to find a reasonable handle

other than what you have already seen as to how one could measure what possibly might have happened with this album. And Canada, which is a subsidiary of our U. S.-- of Capitol Records -- seemed to me offered a very good control market.

And the next four exhibits are all in the same premise. I might call it the market share approach.

In this first exhibit here I took the sales --

THE COURT: Which is that? Exhibit DF?

THE WITNESS: DF, sir. Yes, sir.

THE COURT: All right.

MR. PRETTYMAN: Would it help your Honor to follow this along?

THE COURT: Sure.

MR. PRETTYMAN: Because this is getting a little bit more complicated (handing)

A What I did was, I took the five prior Lennon albums that we had listed and took the U. S. record sales and it says CRC, that happens to be Canada Record Company, it is Canada, to find out what share Canada sales represented of United States sales, with the idea in mind that if we had five albums that were released concurrently by the same artist under the same good or bad conditions, whenever they were released, that the sixth album, if the share was much different in Canada, it would indicate, well, that

something had happened.

In this particular case the thing that was different was, as has been testified by Mr. Zimmermann and Mr. Menon, there was this problem. Canada really didn't face the problem that the United Staets faced. So to get to the heart of the matter, if you took the five prior albums, you will notice that there is a number that says 9.4% meaning that Lennon's sales in Canada were 9.4% of the United States sales.

Given that as a given, since Canada sold 65,000 units of this album through the same time span, through February 1976, one would think that if things had been as the history of these five albums had been, that the United States would sell 691,000 units.

That's a very common technique. What you do is you divide the 65,000 units by the actual 9.4% which Canada represented and you find that the United States would have been, as I repeat, 691.

MR. PRETTYMAN: I will offer that exhibit in evidence, your Honor.

MR. SCHURTMAN: Are you claiming any damages with respect to Canadian sales?

MR. PRETTYMAN: No.

MR. SCHURTMAN: Your Honor, I object to this

exhibit on the grounds that it really has no --

MR. PRETTYMAN: May I correct my last statement?

I think that to the extent that Lennon's stature has been diminished generally, as we have indicated, and to the extent that there might be some kind of an effect in Canada, there might be some harm in the future,but I am not not putting a dollar amount on the Canadian sales for the future.

I am not saying that there was no harm, but I am not asking for a dollar amount in terms of Canadian sales.

MR. SCHUMAN: Your Honor, I simply don't understand the probative purpose or value of this exhibit because if you look at it and forgetting the averages for the moment, it shows that "Imagine," which you know, if you will look at 110, was Lennon's biggest hit, the one that sold one and a half million, it shows a very low percentage in Canada.

On some of his -- one of his terrible records, "Sometime in New York City," it shows a higher percentage. So does that mean that the worse the record, the higher the percentage, and we then get stuck with it in terms of damages? That's what this exhibit shows.

THE COURT: But none of them showed 19%.

MR. SCHURTMAN:No. And I don't know what -- unless the witness can explain the correlation I don't think this exhibit should be admitted at all.

THE COURT: Well, I don't --

MR. PRETTYMAN: The correlation speaks for itself.

THE COURT:-- I don't know whether it is going to end up to be definitive, conclusive, weighty or not, but as a piece of evidence it hangs together, and I understand it. And it simply is taking a type of experience. And trying to project on the basis of experience what would be on the basis of an average experience of Canadian sales versus U.S. sales what the witness would project should have been the U.S. sales of Rock and Roll comes out on the basis of perfectly clear mathematics to 691,000 units. Right?

THE WITNESS: Yes, sir.

THE COURT: All right. So the exhibit is a perfectly valid piece of evidence. The question is whether that experience is going to be something that I can take as something that would have happened here, whether I am willing to accept the average versus a high like Mind Games. But all of that is perfectly apparent and transparent. All the virtues and vices are perfectly transparent.

MR. PRETTYMAN: Your Honor, I think I can help you on the next exhibit and meet his objection. Because the next exhibit does take the two highest. In other words, we have tried to do this to be fair on this and the next exhibit takes --

THE COURT: All right. I will overrule the objection --

MR. SCHURTMAN: There has been no foundation with respect to the Canadian experience. You know this is like that famous statistical example of comparing U.S. Steel production with the birthrate in Saudi Arabia. You can establish a statistical correlation but so what? That doesn't make it relevant.

THE COURT: Mr. Schurtman, just concentrate on his testimony.

MR. SCHURTMAN: I am concentrating.

THE COURT: He says the crucial thing is -- you can cross examine or you can rebut it -- the crucial thing is that the sales in Canada did not experience what he says were the problems of the Roots album.

Again, I am just taking testimony one step at a time. Maybe he is wrong. Maybe you can rebut it. But his testimony, that is the crucial fact of his testimony.

MR. PRETTYMAN: Their own evidence shows there

was no advertising in Canada, your Honor of --

THE COURT: All right, I will overrule the objection. Let us get on.

MR. PRETTYMAN: All right. Next exhibit number, please.

(Defendants' Exhibit DG was marked for identification.)

(Defendants' Exhibit DF was received in evidence.)

BY MR. PRETTYMAN:

Q Mr. Posner, would you tell us what Defendants' Exhibit DG marked for identification is (handing)?

A I thought to myself that some of the older albums on DF which were released in 1970 and '71 and '72, that maybe someone mgiht say, why don't you look at the more recent experience of Canada against the more recent experience in the United States. So I just took the two most recent albums, Mind Games and Walls and Bridges, and it turns out that they were 12-1/2 percent of the United States. If you follow the same identical logic it would show that the United States would have therefore been expected to have sold 520,000 units

MR.PRETTYMAN: I offer that in evidence.

MR. GRUMBACH: You said the two most recent;you

meant the two most recent prior albums?

THE WITNESS: Yes, sir. Sorry.

MR. SCHURTMAN: Same objection.

THE COURT: All right. I will overrule it. Received.

(Defendants' Exhibit DG was received in evidence.)

(Defendants' Exhibit DH was marked for identification.)

BY MR. PRETTYMAN:

Q Would you explain to us what this exhibit is (handing)?

A Well, still in the search for trying to find ways of determining what might have been, I thought to myself that the prior two exhibits contained albums that were released previous to Rock and Roll.

So we took all the albums released in the month of February of '75, which is the month in which Rock and Roll was released, and got the sales of Canada and the United States to find out what the share was of the product released for the identical month. And it turns out that Canada represented 8.6 percent on average, although as you will see some are higher and some are less. If you took that 8.6 percent of product released at the same time it would turn

out that the United States would have been expected to have sold approximately 756,000 units.

MR. PRETTYMAN: I offer that in evidence, your Honor.

MR. SCHURTMAN: Same objection.

THE COURT: I will receive it.

(Defendants'Exhibit DH was received in evidence, Exhibit DI was marked for identification.)

Q I show you what has been marked Defendant's Exhibit DI for identification, Mr. Posner and I ask you what that is (handing).

A Well, again trying to continue this search, I thought someone might say that the eight albums released in February of '75 might be too small of a sample,and maybe a larger sample would seem more reasonable. So I took the albums released two months before February, which was December and January, and the two months released after February, which is March and April, did the same approach on 21 albums and came out with 9.7 percent. This happens to be a good thing to look at because there are albums of artists whose sales are sort of in the same range as Mr. Lennon's. If I might, if you want, the first album on the list is the Grand Funk Railroad which sold 429,000 units, in Canada it was 9.7 percent.

The next George Harrison which sold 405,000 units and it is 9.9 percent. In January Jesse Colter sold 228,000 units --

THE COURT: All right. What are good sales? Does that word have any meaning? Is 300,000 good? 400,000? Or 300,000 poor and 400,000 good or do you not consider anything good until it is a million or what do you--

THE WITNESS: That's really not a good question. If my daughter sold 100,000 units that would be super. But if Paul McCartney came out and sold a half million we would consider it a very big disappointment. So it really depends, your Honor, on who the artist is, and what his --

THE COURT: Is it a big disappointment if John Lennon comes out and sells 500,000?

THE WITNESS: If, your Honor, we hoped it would sell a million and had reason to believe it would, yes, it would.

THE COURT: You said right off the bat it would be a big disappointment if McCartney only sold 500,000, is that right?

THE WITNESS: Yes.

THE COURT: Is John Lennon of lesser stature than Paul McCartney?

THE WITNESS: Yes, sir. Paul McCartney's history of sales is stronger. And I don't want to give a number unless I need to, than John Lennon.

THE COURT: All right. So you would expect higher sales from McCartney?

THE WITNESS: Approximately -- well, never mind.

THE COURT: Well, you know that is what the problem is in this case. Was this -- I don't understand this industry. The figures mean nothing to me in absolute terms. I don't know whether people like Lennon should be selling a million or two million or what. Now, can you somehow give me a kind of common sense evaluation of -- I mean if he is selling 375 or 425 or 435 or something like that, is that up to snuff or is it not?

THE WITNESS: You are asking a difficult question. I will try to answer it.

THE COURT: All right, try.

THE WITNESS: If we refer specifically to John Lennon, okay? After he released some time in New York, the third album on that list, after having a very successful Imagine album, he really sold very few copies. For whatever the problems in the press and the reasons at that time, it just didn't sell.

So now it happens very often, I shouldn't use

the word "very"but it happens often in our industry that when a major artist, a real big artist has a poor selling album, since many artists are quite short-lived in our business they say, gee, he might be through. And oftentimes you can never regain. Okay.

The album after Some Time In New York City, which would have been Mind Games -- I don't have the numbers --

THE COURT: 364 -- wait a minute. 376 according to this exhibit.

THE WITNESS: Yes. It was, I don't want to use the word starting from scratch butwe were rebuilding this artist again. Or together we were rebuilding. And it did do better. Then came out Walls and Bridges, which again did better. So now you have got a little momentum going forward. And you would have truly expected that the next album, provided the album was put out in the same good package and same good everything, would have done better, you would have really hoped so.

And in my experience, your Honor, it is really, and I almost, in a classic ideal situation to have a market as big as Canada --

THE COURT: Well, let's not get into Canada.

THE WITNESS: Okay.

THE COURT: Are you familiar enough with marketing

to tell me what is it that influences the sale of records? And I am talking about the relative importance of posters, T-shirts, advertising versus other factors like when kids listen and they tell their friends this is great, word of mouth or whatever it is that goes on. Are you familiar enough with marketing? You had experience in marketing, didn't you?

THE WITNESS: Yes, I did.

THE COURT: All right.

Now what makes -- what is important?

THE WITNESS: I should qualify, truly, that I never have been in the sales, or promotion activity. My experience in marketing was really more in the administrative controls.

THE COURT: All right.

Then you are really not familiar and you couldn't answer my question.

THE WITNESS: I would not be the expert that Mr. Zimmermann would be. But I could give you my opinion.

THE COURT: All right, give it to me.

THE WITNESS: I think that all the things that you try to do when you release an album, whether it be for radio spots, TV, posters, et cetera, it has got to be implemented -- it should be implemented in such a way

that it gets rolling from the start and carries on. If you bungle it up in the beginning, or if it is disjointed and confused you run the risk, you run the risk, your Honor, that you lose sales in the beginning. And what I mean by that, so it is very clear to everyone, we may get the product out to our customers as Mr. Zimmermann said but it is really the sell through to the consumer. And if you look --

THE COURT: But what influences consumer sales? The thing is I have heard Walls and Bridges and I have heard Rock and Roll. There is a big difference. And I don't know whether people liked Rock and Roll or didn't. And I don't know really if you are to have all your advertising ready three months in advance and had done 20 times as much, I don't know whether this would have gone any better, because I haven't heard anybody who is in the market for that kind of music even tell me how they liked it. Now I have heard it and I wouldn't have the foggiest idea of whether this would -- with all the advertiing in the world -- would have gone or not. You didn't have any Levy competition on Some Time in New York City and it sold 164,000 records.

MR. PRETTYMAN: Isn't that the value of the Canadian figures though, your Honor? Because the --

THE COURT: Let us forget Canada. I am on

another subject.

MR. PRETTYMAN: No, but I am sorry to disagree but I think it is the same subject because if they didn't, if people didn't like the album why didn't they dislike it in Canada? Why do you have this disparity? Why wouldn't PEOPLE dislike it anywhere?

MR. SCHURTMAN: Your Honor, I thought you were questioning the witness and Mr. Prettyman was giving testimony.

THE COURT: Well, Canada is, there are not too many copies sold.

THE WITNESS: I would like to say --

THE COURT: I haven't the faintest idea. Nobody has come in here and told me and you are not a consumer, you are Capitol you want to sell. Now Shaved Fish, 434,000 is a current figure but that's a fairly recent album, isn't it?

THE WITNESS: Yes, sir.

THE COURT: And you don't really have the returns. You wouldn't know how you did until next year, is that right?

THE WITNESS: That is correct, sir.

THE COURT: All right.

THE WITNESS: Well, I don't want to belabor

this point. I really -- I don't want to be contrary. But,your Honor, I really believe that you should not in my opinion minimize the fact that when you -- no one really can say on many artists what it is going to sell and what not. You have to put it out, do your best shot and sometimes you are pleasantly surprised or disappointed. But when you have a situation where you have got a control situation where they were not effected as we were in the United States they have consumers just like we do, we have a track record of what they buy. It's almost a dream type approach.

THE COURT: What do you mean a dream type approach?

THE WITNESS: It is ideal to have a control market that says, we released the same albums when you did but we didn't have your problem and therefore we were able to sell this under normal circumstances. You had the problem, we can't -- the consumers were trying to point out the trend. It doesn't matter whether Imagine sold a million and half units, it is a fact that Canada was a share of that large sales, but they are also a share of the small sales of Some Time in New York City. It is the share that's the very important concept and not the units. The share. Having established what you thought you -- what you would have done based on the Canadian market, then you have some

handle, it is up of course you and the other -- it is up to you to decide how good a handle, to evaluate, but it is a good sound technique, your Honor.

THE COURT: All right, I get it. In other words, you are saying that you take all these figures of any record of any substantial sales, you are never going to have a 19 percent share. You just never --

THE WITNESS: Well, never is maybe an awkward word.

MR.PRETTYMAN: He hasn't so far, right.

THE COURT: Well, I mean you have had for some odd, like Barbara Akron, sales was 28.6. Okay. You say that Canada did not have the problems? Did you get your stuff up to Canada right away?

THE WITNESS: Well, what I did, your Honor --

THE COURT: You got the T-shirts up to Canada before you got them up to Milwaukee?

THE WITNESS: What I did, your Honor, I called our national sales manager in Canada and I asked him to tell me as best he could what they did, if they had problems, and certainly -- I had many send me a telegram spelling it out.

MR. PRETTYMAN: Your Honor, I think their own exhibit showed there was no advertising in Canada so there

was no problem in terms of the similar thing at the same time.

THE COURT: All right, go ahead.

MR. PRETTYMAN: Would you mark this as the next exhibit, please?

THE COURT: Wait. Did you offer Exhibit DI?

MR. PRETTYMAN: If I didn't, I will now.

THE COURT: All right. I will receive it.

MR. SCHURTMAN: Same objection, your Honor.

(Defendants' Exhibit DI was received in evidence.)

(Defendants' Exhibit DJ was marked for identification.)

Q Would you tell us what Exhibit DJ is, please, Mr. Posner (handing)?

A It is another approach, and what was done here by our market research department at my request, there is two pages to DJ.

One is a chart behind it. And the first thing we depicted was the U.S. Sales are on the left, and for example the top number that's one million units, and the Canadian sales are on the right, and this is what you call ratio log paper whereby everything is at a ratio of 10 to 1. So you get the relative growth rate in both countries. And if you track the two -- if you track on the

second page the album sales in the United States against the album sales in Canada there is this very close trand. And what happens, what we did here in this last No. 9, if you will look at Walls and Bridges, which was the immediate preceding album, it sold 48,800 units. And on the next album, Rock and Roll, it sold 65,000 units. That, by the way, is an increase of 33.2 percent. And all we did was say, if U.S. record sales line had increased at the same -- followed the Canadian pattern on the last album then its sales would have increased 33.2 percent to 566,000 units rather than decreasing 20 percent to 342,000 units. It is a simple projection of the trend line on the prior albums.

MR. PRETTYMAN: I offer that in evidence, your Honor.

MR. SCHURTMAN: I would like to ask the witness a question. All these exhibits that you prepared in connection with Canadian sales which you regard as the great laboratory for this purpose, when were they prepared?

THE WITNESS: Last week, your Honor -- I mean -- I am sorry.

MR. SCHURTMAN: They were prepared last week. Mr. Posner, were you in court at the last session two weeks ago?

THE WITNESS: Yes, I was.

MR. SCHURTMAN: When the Judge told Mr. Prettyman that the evidence that had been presented so far -- I won't characterize what the Judge said --

THE COURT: No, don't --

MR. SCHURTMAN: But in any event, when he referred to the types of evidence that he felt should be offered, were you here when those statements were made?

THE WITNESS: Yes, I was.

MR. SCHURTMAN: And was it after the Court had made these observations to Mr. Prettyman that you went back and decided to come up with a new approach?

THE WITNESS: Well, that not entirely correct. At that time I thought I was going to testify too. That's why I came -- I did have Canadian share sales. To be honest with you they were handwritten. I mean there wasn't time. We just didn't -- we didn't do the nice typing Thursday on job. And when I got back Mr. Prettyman said let's use our imagination, be conservative, try our best to be both -- you know, and that's why when I started off with each approach if I thought it was a little bit one way or the other I tried to make them as reasonable and fair as I thought I could.

MR. SCHURTMAN: Had you developed all these Canadian approaches before then?

THE WITNESS: Yes. The Canadian approach share concept was with me on my last trip here.

MR. SCHURTMAN: But you did not have exhibits like this prepared?

MR. PRETTYMAN: He didn't testify.

THE WITNESS: I might say it was the second trip I made to New York without testifying and --

MR. SCHURTMAN: Your Honor, you know the last time I made it an off the record discussion but I do have a problem with what happened at the first session. Because I think the way matters stood at that time there was very little evidence in the record and there was no indication that very much evidence would come in.

MR. PRETTYMAN: Well now, wait a minute. Mr. Posner hadn't testified. I didn't give you an idea of what he was going to testify to. I told you he was going to convert certain predictions and other figures into formulative results. And I in fact warned you that you shouldn't be asking Mr. Zimmermann too many questions because Mr. Posner would have been having an --

MR. SCHURTMAN: Well, I don't know where we are going to wind up in all this. In order to protect my record I do wnat to --

THE COURT: To protect it you can put anything on

the record you want. I don't object to that at all. But as far as any -- I am really being facetious now. As far as any suggestion that I suggested the Canadian approach, you know, that is not -- I don't think you are doing that.

MR. SCHURTMAN: No, I am not.

THE COURT: Now as far as putting anything on the record you wanted, I think that all it will lead to is a response I am quite certain that this witness was here to, in part, to present some of these statistics. Is that right?

MR. PRETTYMAN: Yes. Excuse me, go ahead.

THE WITNESS: Yes, sir.

MR. SCHURTMAN: All right. Look, to the extent that any harm was done, if it was done I suppose it's been done. I don't know what I can do about it. I do think that -- all right, let me drop the point for the time being.

pm

MR. PRETTYMAN: Put it into evidence.

MR. SCHURTMAN: And I would object to this.

THE COURT: I understand the graph. I don't think that is any problem, but the graph seems to be based on the figures we have already. Right, 42?

THE WITNESS: Yes, sir.

THE COURT: Of the various albums Canada and the United States. But this first page I didn't follow you. What is this ratio of ten thing?

THE WITNESS: Oh, well, that just explains that the graph is a ratio chart, rather than an arithmetic chart where each line is equal like 1, 2, 3. It is really not important.

THE COURT: It is just the proportion of -- it is the relative proportions used in the chart, right?

THE WITNESS: Yes, sir.

THE COURT: All right. That is no problem. I will receive it.

(Defendants' Exhibit DJ was received in evidence.)

(Defendants' Exhibit DK was marked for identification.)

Q Would you tell us what Defendants' Exhibit DK for identification is?

A It is the last of the ten different alternative approaches we used. We asked our market research department if they would make a simple linear trend analysis. And, based on that trend analysis, project, what Rock and Roll might have sold. It may be this you will see more clearly if you lookat the chart behind it.

To simplify linear trend analysis is simply where you take the sales of prior product, you put a form to it called leased squares and, you extend the line so that you would say based on this given histrory, this is what the next album would have done. this case, it shows that based on the trend line as I mentioned to you before starting with some time in New York and sort of rebuilding using this formula which is a very common statistical formula, it is even on calculators that you buy and press the button it gives you a leased square. It would have sold 583,000 units in the United States. This has nothing to do with Canada share approach.

THE COURT: What is this Exhibit DX? Defendants' Exhibit what?

MR. PRETTYMAN: DK, your Honor. Move its admission.

THE COURT: Well, I am afraid I don't understand. Just try to explain this to me again. I was fiddling around

with the papers, so I didn't follow you.

A If you take the actual sales, of the three prior albums, and you apply this formula which is called linear regression trend analysis formula, which as I said, it is in every textbook on statistics as a common way of projecting what the next thing will be based on what the past has been, it says that the next album would have been 583,000 units. It might help to just give you a bit more.

If you will look on the front page, the typed page, it says that the formula shows that Some Time in New York City and again just a fomrula, would have sold 191,000 units. It did in fact sell 164.

MR. SCHURTMAN: What do you mean would have sold; I lost you there.

THE WITNESS: We know what Some Time in New York City sold and Mind Games sold, Walls and Bridges. They are facts. But the formula takes these facts, and projects a line that starts from the zero angle, I can't explain it any better than that, I think. But nevertheless, the line that is based on these -- excuse me -- on the three prior album sales, Some Time in New York City, would have come in at about 161. You can see that isn't exactly what it did come in, I'm wrong it's 191. I am sorry.

THE COURT: I think I have heard of this before.

What is the purpose of the linear regression analysis technique? You try to do what?

THE WITNESS: If you have past events where one-half in this particular case, this album sold this much, this sold this, and this sold this, rather than eyeballing and putting a line through it, say "Gee, my eye says that's where the next one would be, " which is a good way sometimes, this just simply says, that statistically given that this landed here and that landed there, and that landed there, the line would be like this. And therefore, the next spot on the line, come down and says that is what the sales might be. It is used in many --

THE COURT: But how do you arrive, I mean, it has a purpose again, you are not eyeballing, you have got on your graph, you have the points that are irregularly placed, right? Some what? And then you don't want to just sort of buy some rough as you say eyeballing, you don't want to just try to get a rough line through, right?

THE WITNESS: Right.

THE COURT: And what then do you do and what do you try to achieve by this?

THE WITNESS: What you do, is and I must tell you, I don't work on the formula. I just remember from my college days in statistics, but if you take this formula

and you have a scatter diagram of these possibilities that's where they fell it will say this given those points if this event were to occur again, in this particular case you put out another album given that the albums fell this way, that is what the next album would be. Mathematically.

THE COURT: You end up with a curve? Or a straight line or what?

THE WITNESS: It could well be a curve, your Honor.

THE COURT: But you have got a straight line here.

THE WITNESS: I think I slipped on that and made a mistake. Actually, this would be a straight line. This would be a straight line.

TEH COURT: I don't think you really understand whatthis formula means. Because it isn't all that -- I had it described to me in another case and I felt I understood it but I don't remember it now. But do you understand the formula and the purpose of having the different calculations or don't you?

A I must confess, as many things that I have been sure of that I have testified to this one I am less sure because it's been years that I have actually myself sat down and wrote out the formula and actually did it. But

I have talked to our in-house expert which is Mr. William Burkhalter who sent me this and I simply said "Bill, use the standard linear regress analysis."

It took him exactly two minutes, because he has a little hadn computer;he just presses the three numbers in, pressed the button and it says given those three numbers, on the three prior albums, statistically, this is where the next album will fall. I really can't say more.

THE COURT: Okay. Are you offering DK?

MR. PRETTYMAN: Yes, sir.

THE COURT: What do you say?

MR. SCHURTMAN: I wish you would accept this. Let the Court try to figure out what it means. I can't.

THE COURT: I don't want to quibble. I am sure it is a valid statistical method.

MR. PRETTYMAN: If you prefer, I will withdraw that.

THE COURT: I don't really understand it. So I will.

MR. PRETTYMAN: I will withdraw it.

THE COURT: Anything else?

MR. PRETTYMAN: Yes.

THE COURT: DL for identification.

(Defendants' Exhibit DL was marked for identification.)

BY MR. PRETTYMAN:

Q By way of preliminary on this one, Mr. Posner, are these two pages an attempt first at 6.98 and then at 5.98 prices to determine actual damages based on the testimony that has come in and various assumptions that have been made?

A Yes, they are except I would say the word estimated damages.

Q Right. Now, since this is of great importance in terms of it represents actual dollar figures, would you explain very carefully just what each one of these is? Take the first page as assuming the 6.98 sale.

A Correct.

Q And the second page assumes a 5.98 sale?

A That is correct. After having prepared what has been submitted so far, I think I then tried to estimate what we might have thought would have been the damages or the loss of profit, conservatively that Capitol incurred because of the events that took place. And I did it in our steps. And if you like, I will walk you through each step.

The first assumption was if Rock and Roll abum had been priced at 6.98, and sold the same units that it sold, underneath that, we mention that it sold 342,000

units in the United States, 65,000 units in Canada, 30,000 in international finished goods for a total of 437,000 units through the end of February. We multiplied that 437,000 units actual sales by 24 cents, That 24 cents is based on had we released the album at 6.98, our unit profit before overhead, fixed overhead, would have been in our best judgment, approximately $1.47. 5.98, it is only $1.23. In other words, of the extra 48 cents that we would have received from our customers on average, we would have retained about half, 23 cents.

THE COURT: Wait a minute. Where do you get $1.47?

THE WITNESS: We have worked up a typical analysis that we do on albums and said that our, for each unit sold,for each unit sold, we would make $1.47 before fixed overhead.

THE COURT: How do you get that?

THE WITNESS: How detailed would you like me to be?

THE COURT: Well, I just think thatnow it is just a figure out of thin air. I don't know why -- isn't that written down somewhere?

MR. PRETTYMAN: He's got all kinds. It would take him about two days to go through all these charts.

THE COURT: It shouldn't take him two days. Why wasn't it -- I got figures this morning for the gross profit, I guess that's what I got this morning. And, I was told that on a 6.9 album, you would sell it for 3.36, I think.

MR. SCHURTMAN: I think what you got this morning was the wholesale price.

THE COURT: Well, that's all we're talking about.

MR. SCHURTMAN: You didn't get the profit figure. The wholesale price is the total amount that is paid. Now from that, you have to deduct costs of production, overhead.

THE COURT: I just want to start. Let me just for starters, let me just do some subtraction.

Well, I was told this morning, that if you sold, wait a minute. That you sold your so-called 6.98 albums for $3.36 and I guess I didn't have any figures at all on what your, or Capitol's gross or net or whatever would be. And you are telling me that you make what, you make an average of $1.47 on that.

THE WITNESS: I better start a step before that, if you will.

THE COURT: But is this based on selling at $3.36?

THE WITNESS: Almost.

THE COURT: Okay.

THE WITNESS: Unfortunately, nothing is really simple in this particular problem because, but it so happens when the album came out, at that time, in February of '75, we had a price for subdistributors and dealers, which by the way I can give you the official --

THE COURT: You had a what?

THE WITNESS: A price for our accounts. That price changed as we changed our prices this fall. We raised our prices slightly to our accounts. And then the 3.36 is only the subdistributors price and it is only on discs. We happen to have a tape price too. Let me give you the official pricing, if you would like it.

THE COURT: Okay.

THE WITNESS: It is a very formal document, all typed up. When the album came out, our actual price --

THE COURT: You mean this is the Rock and Roll album?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: To subdistributors for the disc, was $2.85. I think Mr. Zimmermann said 2.87, but it was 2.85.

THE COURT: He said 2.87, right?

THE COURT: Okay. Price to whom?

THE WITNESS: Subdistributors.

THE COURT: Okay.

THE WITNESS: The tape was $3.50. Now since we sell a mixture of disc and tape you get what we call a mixed price. That mixed price based on the actual price of the tapes and the disc, oh, I am sorry,such a thing, strike that

THE COURT:No, go ahead.

THE WITNESS: Subsequently on September 1, 1975, we changed our prices, and sent out an official new price schedule which said that instead of being 2.85 it was $2.88. A slight increase due to inflation, et cetera. And on the tape, we did keep it the same at $4. Okay?

THE COURT: Right. You told me 3.50.

THE WITNESS: I remembered the wrong line. 3.50. I tell you why I made that mistake in a minute.

THE COURT: Did it remain at 3.50?

THE WITNESS: Yes, it did.

THE COURT: Okay.

THE WITNESS: While I have got the price schedule out, let me tell you what they wouldhave been at 6.98 with the disc, and 7.98 for the tape. Subdistributor price at 6.98 when the album first came out,

was 3.32. And on the tape was $4 even.

THE COURT: Okay.

THE WITNESS: September 1, '75 we raised our prices, it went to 3.36 and the tape remained at $4 even. So, putting this together, for these periods of time, our average sales price at 5.98 we received was 3.06. Whereas, had it been issued at 6.98, it would have been $3.54. Which means that the additional sales revenue --

THE COURT: What was the average price for the 5.98 album?

THE WITNESS: 3.06.

THE COURT: And for the 6.98 it would have been?

THE WITNESS: $3.54.

THE COUI Okay.

THE WITNESS: So that our increase in revenue would have been 48 cents per unit.

THE COURT: Okay.

THE WITNESS: However, there are costs that go up on a per unit basis when you have a higher price. Such costs as royalties, to artists where you sell it for more, they get more. Pressing fee, go up when you sell it for more, we pay more. There also is something that Mr. Zimmermann testified to, co-cop. Our co-op expenditures

with our accounts are tied into the sales revenue that we get. And when we sell it for mroe, we have more money to spend on coQop, so that is an added cost. And, one other added cost, I put in here was that we would have spent more money on packaging the album. And when I added these added costs, they come out to 24 cents per unit. Would have been taken away from the 48 cents extra that we would have received, leaving us with 24 cents a unit.

Q Mr. Posner, you did not consider, did not take into consideration fixed or overhead costs in that, is that correct?

A That is correct.

MR. PRETTYMAN: Your Honor, since I won't be here tomorrow may I give you a citation of the fact that that is the type of method under this thpe of calculation. This one case that fixed or overhead costs should not be considered in calculating profit. And the case is American Electronics, Inc. v. Neptune Meter Company, 30 Ap. Div. 2d 117.

THE COURT: You are saying fixed costs?

MR. PRETTYMAN: Fixed or overhead costs should not ge considered asopposed to --

THE COURT: Well, I guess that is obvious.

MR. SCHURTMAN: Why is it obvious?

Normally you allocate a portion of your fixed costs whatever you turn out.

TEH COURT: I don't think you do at all. In other words, if they were to be made, if by this increased price, they would have made a certain amount of additional profit without increasing their overhead, or any other thing, they get it.

MR. PRETTYMAN: Should I just finish the citation 30 Ap. Division 2d 117, 290 New York Sup. 2d 333 Supreme Court 1968.

THE COURT: All right.

Q Continue on, Mr. Posner as to what is on this exhibit.

A We left off where we said we would make an additional 24 cents which happens to be the difference between $1.47 --

THE COURT: Yes.

A -- and $1.23. So I simply multiplied the 24 cents times the number of units that we actually sold which is 437,000 units and that totals $105,000.

Q In other words, $105,000 is the amount that we would have made if the price had been $6.98 instead of $5.98 but we had sold the same number of albums?

A Yes, sir.

Q We would have made that much additional, right?

Do you want to pass on to paragraph 2?

MR. SCHURTMAN: May I ask one question before you leave that? I can wait until you cover the same thing, but it will be the same question.

Are you going to tell me how we arrive at the profit figures? In other words, what your costs are? Or do we simply accept your figure of whatever you showed as a profit?

THE WITNESS: You can have it either way. I only would like to say, I would like to get back to Los Angeles as quickly as I can.

MR. SCHURTMAN: Your Honor, I mean, we have had an interesting explanation of the increase in revenues and the fact that certain variable costs would increase, but we haven't heard yet and I just want to know what the costs are to begin with.

In other words --

THE COURT: It depends on what you ask him.

MR. PRETTYMAN: He's got all the supporting

papers here. You can cross-examine as long as you want to.

MR. SCHURTMAN: No, I think it is up to a witness when he says,"Your Honor, we wouldhave made X cents profit per unit," I think it is up to him to show how he would get the profit.

THE COURT: Now look, he has testified as to what he says is a fact; that is, that the increased profit, taking into account these variable costs, is 24 cents per unit, on the average.

Now he says that is a fact. Now --

MR. SCHURTMAN: Are you going to --

THE COURT: I mean that is admissible evidence. Well, it is. And I don't even think it was objected to.

MR. SCHURTMAN: I am objecting to it right now unless we get the underlying figures.

Your Honor, you can't have a businessman come in here and tell you "I would have made so much profit."

THE COURT: It is just a matter of form. There are lots of ways. We can have it gone into on direct, we can have it gone into on cross, or I am going to suggest you go into it on a deposition because -- or go hire a special master, because this trial is now -- this is the fifteenth day.

MR. SCHURTMAN: I can't help it.

THE COURT: The lawsuit should never have occurred in the beginning and it's been fifteen days and there is a limit. And I want to go into details. I love details and I need details and you are entitled to get every last detail.

But it is not going to be before me. You are going to have a deposition or something. I will figure it out, but you can't go back to Los Angeles. Mr. Prettyman can go back to Washington but you are stuck, I am afraid. OK. We have got about three more minutes and then we will finish.

MR. PRETTYMAN: Well, I don't think he can finish paragraph 2 in three minutes.

THE COURT: I am finishing at seven and that is that. The reporter is finishing.

MR. PRETTYMAN: You want me to go ahead? Is that what you mean?

THE COURT: Yes.

Q Go ahead with paragraph 2. What i[illegible]?

A Paragraph 2 very simply was, we submitted, we came up with ten methods and I didn't want to pick or choose which were the most important. And I simply took the arithmetic average of the ten methods.

Q Which of the ten methods are you talking about?

A The ten that we described at some detail a bit back.

Q That is on Defendant's Exhibit DC for identification --

THE COURT: All right, what did you do, take an average?

THE WITNESS: I took the arithmetic average. I didn't want to play --excuse the term, Judge, and decide which should be the most important of the different techniques used.

I did two things. I took the arithmetic average which was 645,000 units, and I took the money, which is money median -- I took the money which is the mid-point, and the mid-point of the ten numbers was in between 5 and 6, No. 5 and 6, and we start with the lowest number first.

It turned out to be 658,000 units. OK. Anyhow, I took the 645,000 units and said that is 303,000 units more than we actually sold to date and therefore-- at $1.47 per unit, that would equal so much money, which would have been $445,000.

From this I subtracted additional merchandising cost that I -- fixed costs that we would have put into an album had we had more time to release it, would have done

more posters, more tee shirts,more displays, whatever, and I came up with $420,000.

The third approach was Shaved Fish.

Mr. Zimmermann has testified what he thought was the hurt on Shaved Fish.

THE COURT: And you just multiplied?

THE WITNESS: I just multiplied it out.

THE COURT: OK.

THE WITNESS: The last alternative was I took the remaining two future albums that we have the right to repackage and we thought of -- we just tried to--

Q Was that pursuant to his changed testimony, changed estimate?

A That is correct. I would like to add if we have a half a minute left,whatver, that totals,by the way, $1,040,000.

If you follow the same thing on the next page, it is all $5.98. It would have been $663,000.

THE COURT: In other words, this simply is the same type of calculation only you don't have additional profit because of a dollar higher price?

THE WITNESS: Yes, sir.

THE COURT: And the other elements are based on $1.23 profit versus $1.47, right?

THE WITNESS: Yes, sir. I would like to add one thing.

THE COURT: Sure.

THE WITNESS: You will see a footnote down there that says to be conservative.

Your Honor, you know, I thought about it and there are many ripple effects that you could have. I didn't feel maybe we should put it in to be conservative. But let me at least touch on the points and as a matter of fact I worked up a number just this morning sitting in court what this might amount to, and it is fairly sizeable, it is not--

THE COURT: What are you speaking about now?

THE WITNESS: My conservative points that were not put in the number above, and the $1,040,000, these things are not quantified. You see the footnote --

THE COURT: Sure.

THE WITNESS: The first thing says that in Canada and International, on the Rock and Roll album, or the Shaved Fish album, the two future packages, there was no loss of sales there. And that is, I could give you evidence that that really isn't quite the case. There was a minor problem, a minor loss of sales.

The second item is that all over the world,

United States, Canada and International, we will be hurt to some degree on the existing sals of existing catalog albums.

It could be to a minor degree but as an artist starts to regain his stature--

THE COURT: I can read these pretty well, and see them. I think this is pretty self-evident. I think what you are saying -- OK, do you have any further questions?

MR. PRETTYMAN: No, sir. I offer that in evidence.

MR. SCHURTMAN: I am going to make a detailed objection. I would like to state a detailed objection on the record and I will do it in the morning since you want to stop.

THE COURT: Well, I want to rule while Mr. Prettyman is here, and that is that I am going to receive this because this is simply a summary of his testimony, and to the extent it is not a summary of his particular testimony, and simply a calculation, putting together a number of other things in Capitol's case.

I don't know how -- I don't know how else Capitol is going to get its case --

MR. SCHURTMAN: Call it what you will. If you call it his testimony fine. I object to certain portions

of his testimony. For example, I have never heard of a witness being allowed to testify as to what his profit is without telling you the underlying costs, which he has not done. He simply told you the changes in costs, but not the underlying costs.

Now that is not a matter for cross-examination. That makes his testimony inadmissible ab initio. At least that is my understanding of the law.

He has tsetified about sales in other countries--

THE COURT: You are welcome to give me a case. I don't think there is an inflexible rule that requires him to specify every element of costs in order for him to testify. But I don't want to quibble over that.

Anybody who wants to draw out those costs can do it. They have got full opportunity to do it.

MR. PRETTYMAN: He has the papers right here. And if there is any question about this,I want him to testify tomorrow on this element. I don't want this to be in doubt, and I will put it in on direct if there is going to be any question about it. But you know, I am --

MR. SCHURTMAN: If you are going to overrule my objection, obviously I will try to bring it out on cross. All I am telling you is I should not even have to go that far.

THE COURT: Well, Mr. Schurtman, the thing is, and I think you have pointed it out, we are dealing with elements here as to which there has basically been neither pretrial nor discovery. Now if this at all, if we had had a pretrial on all of this you wouldn't be in the position in court of inquiring about the costs. This would have been explored in pretrial and probably stipulated subject to rulings of law.

MR. SCHURTMAN: I couldn't agree with you more.

THE COURT: What?

MR. SCHURTMAN: I couldn't agree with you more.

THE COURT: So we have got to figure out a way. I can't consume court time with discovery. And I am going to suggest that if there is anything we can usefully do tomorrow, to use the day, because I have set it aside, except for some things like conducting a little ceremony to admit some new citizens, but I am certainly happy to take the day and make progress. But I am not happy to take the day on discovery.

Now if you are going to be in the position of examining this witness, as to things that you don't know and you have no reason to know, I am going to ask you to do it in a deposition.

MR. PRETTYMAN: I can point out that he could

have taken a deposition.

THE COURT: I am sure the upshot of this is going to be that there is very little you are going to present in court. You just won't do that. This is the kind of stuff that is probably all down in black and white and it is incontestable.

Now what do you want to do?

MR. SCHURTMAN: Costs are incontestable.

Did you hear Mr. Levy being cross-examined for two days on his cost figures where everybody kept saying no, the pressing costs are different?

THE COURT: A completely different thing. It was a question of what he was saying.

Let's not get--

MR. SCHURTMAN: Come on.

THE COURT: All right, Mr. Schurtman, I am saying to you that I will not have my courtroom used for discovery. You can have discovery if you want it.

MR. SCHURTMAN: Your Honor, I can't.

THE COURT: But I can't do it and I will let you take this man's deposition tomorrow if you want to and then you can figure out with Mr. Prettyman or Mr. Granett or whoever will be present, you can figure out what is to be stipulated and what are the issues for me to try.

MR. SCHURTMAN: Will you let me take his deposition tomorrow?

THE COURT: You can take his deposition but if there is evidence on which we need no depositions, I am prepared to sit in court and this witness can lay over for a deposition. He can stay over here for as long as he is needed.

MR. SCHURTMAN: At this point I don't know what you are willing to take in court and what you are not. I mean there are certain areas I want to question him about.

THE COURT: We had a perfectly profitable day in admitting evidence which was needed in court. If there is another day we can have like this, we can have it.

MR. SCHURTMAN: May I suggest this procedure, your Honor? That I start cross-examining him tomorrow and in any area where you feel it is a proper subject for deposition, we will take it later in the week and then I will move on to different areas.

THE COURT: Who is the next witness?

MR. BERGEN: Mr. Lennon.

MR. PRETTYMAN: I just want to strongly say that I strongly object to a deposition at this stage. He had plenty of opportunity to depose anybody he wanted to.

We took a lot of depositions. He took a lot of depositions and he couldhave deposed anybody on any subject that he wanted to at any time.

THE COURT: But I have to tell you, Mr.Prettyman, that if there is a real issue about these costs, I can't really help what went on in the past -- I can't have court time taken up -

MR. PRETTYMAN: That I understand completely.

THE COURT: I have to inconvenience you or Mr.Posner or anybody else.

MR. PRETTYMAN: I understand that.

THE COURT: And I think the thing will work out.

Is there a way for Mr. Schurtman tonight to look over some of your materials? Mr. Granett is going to be here and I know it may mean a late night, but why don't you --

THE WITNESS: I do have a copy.

THE COURT: We can get you back to LA if we can do this; my only objective is I just-- I have to have a procedure whereby Mr. Schurtman finds out this cost information without having it dragged out point by point in court.

MR. PRETTYMAN: We will give it to him tonight.

Can we have a stipulation that no copies will

be made because obviously this is extremely confidential?

THE COURT: Mr. Schurtman is taking everything confidentially.

MR. PRETTYMAN: But there will be no copies made. I would just like that on the record.

MR. SCHURTMAN: So stipulated.

THE COURT: All right.

Mr. Schurtman is going to try to do his review of it tonight and try to come to court tomorrow ready to see if there are any areas of real dispute, otherwise -- not just go on and on about it. I am sure he will do that.

All right, we will see you tomorrow. I will see you at 9:30.

At 10:30 I have to suspend briefly to perform a little ceremony for new citizens; otherwise, I am with you the whole day.

I will receive DL.

MR. PRETTYMAN: And would you also receive DC which was the list that has now been explained although--

THE COURT: I finished with that.

MR. SCHURTMAN: Your Honor--

MR. PRETTYMAN: If you don't think that is helpful --

THE COURT: I will receive DC.

MR. SCHURTMAN: Your Honor, will you let me state my objections tomorrow?

THE COURT: Sure.

I am receiving DC simply to the extent that the underlying exhibits and testimony have been permitted. It is almost like a brief as far as I am concerned.

MR. PRETTYMAN: DD is not marked as admitted and I don't know why.

THE COURT: DD was received.

MR. PRETTYMAN: It is just not marked.

(Defendant's Exhibit DL received in evidence)

MR. GRUMBACH: Your Honor, I don't have any witnesses tomorrow. Mr. McHugh may be here in my place. Is that all right?

THE COURT: All right.

(Adjourned to 9:30 a.m., March 31, 1976)

Big Seven Music Corp. et al.

v. 75 Civ. 1116

John Lennon, et al.

New York, New York

March 31, 1976
9:30 a.m.

- - -

(Trial resumed.)

- - -

Additional Appearance:

Granett & Gold, Esqs.,
Attorneys for Defendants Capitol Records & EMI,
By: Solomon Granett, Esq., of Counsel

- - -

THE COURT: You may proceed.

MR. GRANETT: May it please the Court, I have not previously addressed the Court in this action. My name is Solomon Granett, of the firm of Granett & Gold. We are counsel with Hogan & Hartson for the defendants Capitol Records and EMI.

Before bringing Mr. Posner back to the stand, I would like to indicate to the Court that in conformity with the discussion which was taken place when we suspended last night,we handed to Mr. Schurtman for overnight possession the blue sheet document, which Mr. Posner

indicated was a highly confidential piece of information having to do with the costs of production of Capitol. Our objective hopefully was that Mr. Schurtman would be satisfied with the bottom line number given by Mr. Posner, and we would go on from there this morning. Mr. Schurtman said that that objective was not accomplished, that there would have to be further questions on that score. We did not have very much time to explore it, but Mr. Posner said that he overnight had attempted to simplify it with a hand drawn exhibit. He showed it to Mr. Schurtman. There was very brief discussion, and I am afraid we will have to return to that subject in due course.

THE COURT: I am sure it is simplified as a result of having Mr. Schurtman look at it.

MR. SCHURTMAN: : I think we can simplify the matter very much. Once I question the witness, when I get to that point, I will suggest a method of resolving it.

THE COURT: I think the main thing was to have it in Mr.Schurtman's hands last night.

MR. SCHURTMAN: I appreciate the defendants giving it to me.

MR. GRANETT: Overnight we attempted, or Mr. Posner did in this case, to fill in some of the information which was not readily available to him in two areas:

One was the projected figures for the five Lennon albums which have appeared on these exhibits we have been talking about, and he has got some information on that, although not a hundred percent. He will tell us about that; and the other has to do with an explanation as to why the three previous so-called Lennon albums were not included in the exhibit.

MR. SCHURTMAN: If Mr. Granett wants to put Mr. Posner back to complete his direct, I have no objection, rather than have him tell you.

MR. GRANETT: I was just going to make the preliminary statement.

THE COURT: We are a little pressed for time today. I appreciateyour statement. But can't we get on with the witness and you examine Mr. Posner further or let Mr. Schurtman do so.

MR. GRANETT: Yes.

THE COURT: Go ahead.

MR. GRANETT: Please come, Mr. Posner.

H A R O L D P O S N E R, resumed.

DIRECT EXAMINATION (Continued)

BY MR. GRANETT:

MR. GRANETT: May I have this two-page document marked for identification.

(Defendants' Exhibit DM was marked for identification.)

Q Mr. Posner, I hand you Exhibit DM for identification and ask you whether you prepared that document or was it prepared under your supervision and control?

A Yes.

Q Could you tell us what it is intended to depict?

A It estimates the damages, the loss and profit that would have been incurred by EMI.

THE COURT: You will have to explain that. I don't understand.

THE WITNESS: The Beatles' contract is with EMI, and Capitol Records pays a pressing fee to EMI on every one sold.

THE COURT: Capitol pays to --

THE WITNESS: To EMI a pressing fee on sales because EMI bears all costs of recording. I used the same identical approach as was submitted on estimated damages to Capitol Records and the same identical format, but instead of using the Capitol Records profits, I used the pressing fee. In Exhibit 689 you will notice that we say on the Rock and Roll units that were sold there would be an additional 3.4 cents.

THE COURT: Give me just a moment. I got my papers mixed up.

All right.

THE WITNESS: An additional 3.4 cents per unit pressing fee that would be paid to EMI at $6.98 versus $5.98. And that was priced out to be $15,000 on the units sold.

THE WITNESS: Then using the same identical methods again that were used on the prior analysis on the lost units, we multiplied the lost units by what EMI's pressing fee would have been, which is 12-1/2 cents on average, and in total, it is estimated that EMI might have suffered damages of $97,000.

Using the same identical approach on the $5.98 album it turns out to be $72,000.

THE COURT: All right, go ahead.

Mr. Granett, anything else?

MR. GRANETT: Yes, sir.

BY MR. GRANETT:

Q With respect to projections made in the ordinary course of planning, specifically concerning the five albums which were the basis for the exhibit, namely, Plastic Ono Band, Imagine, Some Time in New York City, Mind Games and

Walls and Bridges, did you overnight ascertain something about the projections which were made by Capitol in the ordinary course of its activities?

MR. SCHURTMAN: Before we get into that, is Mr. Granett offering this last exhibit?

MR. GRANETT: I intend to before the witness leaves the stand or I can offer it now. I do offer it now.

MR. SCHURTMAN: Because I do object to the witness' tsetimony and the exhibit, and last night your Honor told me I could state my detailed reasons this morning. We didn't have time last night.

I would like to make a detailed objection.

THE COURT: Sure. You are going to talk about DL first?

MR. SCHURTMAN: Well, I am --

MR. GRANETT: DL was admitted.

MR. SCHURTMAN: I am going to talk about all the witness' testimony and the exhibits relating to damage projections. I have a number of specific objections which I think I should put on the record.

Should I do it now?

THE COURT: Fine.

MR. SCHURTMAN: Well, basically, my objections

to the witness' estimates of damages, both testimony and exhibits, are based on the following:

In the first place, they were based on incomplete sales figures since they omit the first four Lennon albums.

We brought that out yesterday.

They just decided on a particular cut-off date without really explaining it.

Secondly, no foundation at all was laid for the projection of 750,000 albums.

The projection that was made in February 1974, which is an integral part of the damage estimates, they did not explain how that projection was arrived at.

Thirdly, the Canadian figures have no supporting data showing whether the Canadian conditions are the same or different than the United States and again all of the estimates are based on the Canadian figures.

Fourth, I believe the New York cases, and I will have to brief that point for you, your Honor, it is quite clear that you can't simply come in and claim profits without showing your underlying costs and showing how you arrive at the bottom line figures.

So far the witness hasn't done that.

Fifth, I think the New York law is very clear, and I have cases on that point, that you cannot claim

damages or lost profits with respect to books or albums which have not even been published yet, where there is no certainty that they will be published, where you don't know what will be published.

That point has come up in courts time and again and you can't simply say, "Well, I intend to put out two or three more things and I will be damaged on those as well."

There is simply no factual foundation for showing how you would be damaged on something like that.

And finally, I think Mr.Posner's entire testimony suffers from the same fatal flaw that affected Mr. Zimmermann's testimony and Mr. Menon's testimony.

They simply have not shown any causal connection between what the Roots album --

THE COURT: Those aren't objections. Those are arguments about the weight of the evidence. All of the points you raise are important, but I can't even appreciate your discussion unless I see what their evidence is and to tell me that I shouldn't receive any evidence -- we are just going around in circles.

The point is what weight does this evidence have, and if the things that they propose are so ephemeral that they should not be given weight, I want to know that.

hp:mg 5 -Posner-direct

I am just talking to you about the procedural way to raise this, and these things are before me and I want to know whether they have weight or whether they don't.

Obviously I am very interested in your arguments and the other side's arguments on that point.

MR. SCHURTMAN: I will argue it, your Honor. But I also think --

THE COURT: All right.

MR. SCHURTMAN: -- that they are appropriate objections to be made at this point.

THE COURT: You have your record on that.

MR. SCHURTMAN: I appreciate it. Thank you.

THE COURT: Now I will admit Exhibit DM on the same basis I admitted DL.

xx (Defendant's Exhibit DM received in evidence)

THE COURT: The only thing is that the essence of DM is the contention about a pressing fee and I certainly don't know much about that. It is just a figure.

I think you ought to bring out what that is.

I have a piece of paper saying 12.5 cents per unit pressing fee, 3.4 cents -- what is the pressing fee?

MR. GRANETT: I will address the question to the witness, your Honor.

Q Do you have Exhibit DM before you,Mr. Posner? That is the one headed EMI Pressing Fees consisting of two pages, one $5.98 and one $6.98.

A Yes.

Q Would you please take us through the four stages that are set forth in whichever --

THE COURT: I understand the stages. I just don't understand what the pressing fee is.

Q Would you explain that, please, Mr.Posner?

A I will certainly try.

THE COURT: OK.

A When one record company signs an artist or a group on a contract --

Q A little louder please, Mr. Posner.

A -- that company almost generally owns the masters that are recorded, and they pay for the masters. EMI has the contract with The Beatles. Capitol distributes them in the United States. Therefore since EMI pays the recording costs, like any other record company would pay the recording costs and owns the masters, the company that gets the rights to distribute it in different places in the world pays a pressing fee.

It is a very common type arrangement and the pressing fee is the amount that is charged, is just an

hp:mg 7 Posner-direct

arm's length typical transaction. The pressing fee on a $5.98 album is 9.1 cents per unit sold.

THE COURT: Was that according to some contract?

THE WITNESS: Yes, it is. I could even show the Court --

THE COURT: A pressing fee on a $5.98 album is what, are you saying?

THE WITNESS: Is approximately 9.1 cents. And the only reason I use "approximately" - I can give you the exact pressing fee on the disc, the exact pressing fee on the tape, and if you mix the two together, depending upon this sales mix --

THE COURT: This is on an average basis?

THE WITNESS: Yes, sir.

Q Would you say that perhaps the term "pressing fee" could be better described as perhaps a royalty fee for use of the master?

A Sure.

Q In other words, we are not talking about somebody beingpaid for pressing at all. We are talking about somebody being paid for use of the master, is that correct?

A That is correct.

Q Now, does it go up, if it costs $6.98?

A Yes, sir.

MR. GRANETT: That is shown on the second sheet of Exhibit DM.

THE COURT: Is it 12.5 cents?

THE WITNESS: Yes, sir.

THE COURT: OK.

Anything else?

MR. GRANETT: Yes.

THE COURT: All right.

Q With respect to the projections on the records I spoke about, have you ascertained anything overnight that you did not know yesterday?

A Let me make sure I understand the question you are asking. The projections--

Q Well, let me clarify the question.

One of the items you testified about was an exhibit, I think it was DE.

THE COURT: DD, that list of --

MR. GRANETT: I am talking about DE, your Honor.

THE COURT: All right.

Q Would you look at this?

A Yes.

Q Do you know the one I mean?

A Yes, I do.

Q You spoke of a projection made in the ordinary

course of Capitol's business as to the expected revenue from the next Lennon album. And that was shown on Exhibit DE.

The question then arose, I believe, a question from the Court which you were not able to answer: Were similar projections made with respect to earlier Lennon albums?

A Yes, they were.

Q And what is the answer to that question?

A I have put together these numbers and I can read what I have, if you like.

Q Do you have it in the form of a handwritten exhibit for your own use, which you made overnight?

A I didn't make it overnight.

Q I see.

A I had it with me and I have it. It is just notes but it could be given if you like.

Q If it is easier to just read the figures into the record, let's try that first. The notes seem to be a little more complex than we want to get into the record.

A Well, I went back as far as fiscal 1972's budget.

Q A little louder, please.

A And in that forecast we projected we would have one Lennon album that would sell 600,000 units. The

album came out "Imagine," and it sold 1,340,000 units in the first three months. We missed that projection badly. It was a very successful album.

I should clarify that the projections we put in our budget -- we are talking about the first 90-day sales -- we have new release sales and catalog sales.

THE COURT: So the 750 was a new release sale projection?

THE WITNESS: Yes, sir.

The following year, in spring of 1972, when we made the budget for fiscal 1973 --

THE COURT: How many did you sell of "Imagine" in this first 90 days?

THE WITNESS: 1,340,000 units.

THE COURT: OK. Go ahead.

A For the fiscal 1973 budget, we had one album in there at 750,000 units. Because "Imagine" had sold well, we raised our forecast.

THE COURT: What did it turn out you were projecting for -- what record?

THE WITNESS: We didn't know -- most of the time, your Honor, you really don't know that far ahead.

THE COURT: But what did it turn out?

THE WITNESS: It turned out to be "Some time in

New York" which did bomb out. And for the three months' sales it was 493,000.

THE COURT: Your projection was what? 750?

THE WITNESS: Yes, sir.

THE COURT: And the three months was?

THE WITNESS: 293.

The next fiscal year, we again lowered the projection for fiscal 1974 to 600,000 units thinking that "Some Time in New York was an unusally bad album, or bad sales album, and we would try to rebuild from that point.

"Mind Games" came out, and in three months its sales were 580,000.

THE COURT: So your projection was 600,000?

THE WITNESS: It came out 580.

Now that we felt that we were on a -- had picked up a little momentum to go forward, when it came to fiscal 1975, we again raised the projection to 750,000 units anticipating improvement over "Mind Games" and "Rock and Roll"s first three months' sales.

Q What was your projection for Walls and Bridges?

A In the budget we had only one album for the year. It did turn out we did get Walls and Bridges, but sometimes we plan on one album and we get two,and sometimes we plan on two and get none. You can't always get exact product delivery.

THE COURT: So you were projecting for an album?

THE WITNESS: Well, as I testified yesterday, the A&R people, as well as our sales people, at that time had knowledge that they conveyed to me that they expected the album was coming out, it was in the works, it would be a rock and roll album, and that was what we had in mind when we projected the 750,000 unit.

THE COURT: What was the three-month sales?

THE WITNESS: 417.

THE COURT: Go ahead.

THE WITNESS: That is it.

BY MR. GRANETT:

Q Do you recall yesterday when we spoke about Exhibit DF, which enumerated Plastic Ono Band and Imagine and the other three, and the question arose as to possible exclusion of prior so-called Lennon albums. Have you now an explanation for that exclusion?

A Yes.

I picked up a telegram this morning from the head of our legal department offering the reasons that he felt why they were excluded. Shall I read it now or read the part that applies?

MR. GRANETT: I have no objection to offering the telegram in evidence.

THE COURT: What about that?

MR. SCHURTMAN: I object to both the testimony and the telegram.

THE COURT: I will have to sustain that.

Q If you were sitting at your desk and you sought to ascertain this information as to the omission of these earlier so-called Lennon albums, what would you do?

THE COURT: That is not of any help. He doesn't know, and if Mr. Schurtman attempted to cross examine him he would not know how to respond. So I am not going to permit that kind of testimony. You got to get somebody who knows. Maybe Mr. Lennon knows.

Q Just tell us, Mr. Posner, what you personally know about this? Don't tell us anything that might be called hearsay or secondary evidence. Just tell us what you know, and then we will rely on Mr. Lennon's testimony to fill in whatever he knows.

MR. SCHURTMAN: I wish he would exclude anything based on telegrams that he read this morning.

THE COURT: It is a matter of who presents the evidence. If you are relying on somebody else and you really don't know, and that is what you said yesterday, you don't know why --

THE WITNESS: Well, your Honor, I tried to be very careful and speak on what I did know for sure. I have been around the company a long time, and I was pretty sure that I knew not the legal terminology or just the essence of it, but it is true I could not speak with absolute authority, which is what you are seeking, but I do have a more than layman's knowledge, and if you want I can try to explain it very simply to you.

THE COURT: You mean about the distinctions between these albums?

THE WITNESS: Right.

THE COURT: All right. What are the distinctions?

THE WITNESS: There are in this arrangement with the Beatles two separate type of Beatle contracts: One is called Apple Beatle and the other is called Apple Non-Beatle, which Capitol has had contracts with Apple in both cases. They are entirely different in many respects.

mmbr 4 Posner-direct

For example, in Apple Beatle, in which Capitol pays a royalty to Apple, which we will get into, is a typical Beatle royalty. Capitol owns the masters. It takes the obsolescence --

THE COURT: I don't need all this. The question is not the legal relationships, the question is whether from the statistical standpoint, the standpoint of the type of record there is any distinction between these other three or four and the ones which were included in the statistics.

Now, I couldn't care less about the legal relationships. If Mr. Lennon made it through MGM, it would not make any difference to me.

MR. BERGEN: I do believe Mr. Lennon can clarify this.

THE COURT: Why don't we wait for him?

MR. GRANETT: Thank you, sir.

THE COURT: Cross examination?

MR. SCHURTMAN: Your Honor, may I just take a moment to apologize for seeming somewhat irritated last night even with you working a hard long day, and I said some things I should not have said. I would like to withdraw them.

THE COURT: No, we all have long days and

there is nothing amiss at all. Go ahead.

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Do you have the exhibits in front of you, Mr. Posner?

A Yes, I do.

Q Let us start off with the February 1974 projection. Explain to me again very briefly how these projections are made, for what purpose, and who makes them.

A Before we release albums that are going to involve a fair amount of moneywe like to have a routine profitability review made to see what we think it would do for us, and as I testified yesterday, you get the sales estimates from Mr. Zimmerman of what he thinks he will sell of this album in light of competitive albums, the best cost estimates you can get, and at the price of $5.98 whether we can make a profit.

Q I am not asking about those estimates. I will get to those. Those were Mr. Zimmerman's range of 300,000 to 500,000. I am now addressing myself to what was apparently a budget estimate for fiscal 1975 of 750,000, Exhibit DE. Let us focus on that for a moment.

A Yes,sir?

Q Tell me how that kind of an estimate is made

and by whom.

A There are meetings that go on in this very time now, this budget cycle, whereby we build up our budget for the coming year, and your starting point is sales.

You go down the artists that you have under contract, the albums you kind of hope to get. The sales people get an estimate of what they think they will sell. You price it out, and when it is approved, that is the budget.

Q Now, who are the individuals who make these estimates? Did you, for example, make the estimate of $750,000 yourself?

A No.

Q Who did?

A It would have been done by Mr. Zimmerman, who was the sales chief at that time. He would have been primarily responsible with Brown Meggs, who was at that pint either senior or executive vice president in charge of the United States record business.

Q Now, these official budget projections, are they circulated in handwritten form?

A Yes.

Q Which you have given us DF?

A Yes.

mmbr 7 Posner-cross

Q And you sent us a cover sheet. What does the cover sheet say?

A It says attached is a rundown. This is something like the fiscal '75 budget. It has a little comparison. It shows pop album sales and all, and it adds it all up. The first page is a breakdown of the artist, the second would have been a breakdown by EMI repertoire category and label, and then some other statistics on returns, whatever else was relevant people should know in looking at it, but before it finally got signed off by the president of the company.

Q Do you have the complete document with you?

A No, I do not.

Q Do you have any parts of the document with you, other than the one excerpt you gave us?

A Yes, I have. I believe I have the top page.

Q Let me see the top page at least.

MR. GRANETT: Before you exhibit it to counsel, I would like to inquire of the witness whether there is a confidentiality problem here.

THE WITNESS: Yes, it certainly would be so.

THE COURT: You have a lot of confidentiality problems. That kind of thing is produced subject to that restriction?

MR. SCHURTMAN: I agree to that.

May I see it?

I am going to ask that it be marked for identification.

(Plaintiffs' Exhibit 236 was marked for identification.)

Q Mr. Posner, your budget projections set forth the date on which they are based?

A Can you be more specific?

Q For example, you have told the Court it was your understanding that the next Lennon album would be a Rock and Roll album. Now, is that set forth in this document?

A No, sir.

Q So that whoever reads this document doesn't really know what kind of an album Lennon will produce?

A That is correct, sir.

Q It could be Some Time In New York City or it could be Imagine or it could anything else he chooses to produce?

A That is correct.

Q And it is up to Mr. Lennon to decide what type of product to put out?

A That is correct.

Q And Capitol really has no say in the type of product he is going to put out?

A I believe that is a fair statement, too.

Q The most they can do is refuse if they don't like it and even that may be questionable?

A I think you are right, sir. I should say outside of the official recap that we send out, there are little notes when we are going over each artist, and I wouldn't be a bit surprised maybe somewhere if said in a detailed note that on the Lennon album "(probably Rock and Roll)".

Q Do you have such notes?

A No, I do not.

Q Do you know whether such notes, in fact, exist?

A I have a habit of throwing away detail.

Q Is this sheer speculation at this point that there were such notes?

A No, I was just telling you that it could very well have been. Maybe you can call it sheer speculation.

Q It could have been, but you don't know?

A Right.

Q At the time this projection was made, I assume when you made the projection you were aware of the fact that Some Time In New York City had done very badly?

A Yes.

Q You knew it had sold only 164,000 albums?

A At that time it would have been some other number but, yes.

Q I think by February of 1974 you should have known the net result, but I wouldn't argue the point.

A You are wrong there.

Q You knew it had bombed, using your expression?

A That might have been a poor expression.

Q I think it fits.

Now, the man who prepared the projection also notes that Mind Games hadn't sold more than a gross of 580,000 before counting returns, and that the net was only 376,000?

A You are off at one point, Mr. Schurtman. You don't know in February, 1974, what the returns are going to be, or in March of 1974 what the returns are going to be in March of 1976.

Q But you did know in February 1974 and I direct your attention to Plaintiffs' Exhibit 110, which is one of the sheets that your department prepared, that in 1974, at the end of 1973 you knew that Mind Games had sold a gross of 598,000 before returns?

A That is really not the proper way you want to

state it, sir. At that time 580,000 is the net through that date.

(Continued on next page.)

Q Whatever you call it.

A That is what it is.

Q You knew that there had been a net of 580,000 and that all the returns were not yet in?

A Many albums come back with returns, other albums sustain themselves and go on, depending on the future albums of the artists.

The catalog sales like "Imagine" are still selling, they are not in returns.

THE COURT: I don't understand what really the significance is of a 90-day estimate. In other words, we heard yesterday from one of the witnesses, and I think it was Mr. Zimmermann, that the returns, the massive returns come back 12 to 16 months after release.

Now you are telling me that there is a 750,000 album or unit estimate for the first 90 days, right?

THE WITNESS: Right.

THE COURT: Well, that is according to the testimony before the bulk of the returns would ever come in, right?

THE WITNESS: Right.

THE COURT: So I don't see that it even has any meaning.

THE WITNESS: Could I try to tell you why?

hb:mg 2 Posner-cross

THE COURT: OK.

THE WITNESS: Mr. Schurtman, may I borrow the sheet of paper that I just gave you?

THE COURT: Could we recess now? I told you I had to go up and do this Immigration swearing in, and I have to take care of a very short criminal matter. I will be back with you, I think, by about eleven o'clock.

(Recess)

HAROLD POSNER, resumed:

CROSS-EXAMINATION(continued)

BY MR. SCHURTMAN:

THE COURT: I think I asked you a question right before.

Why am I able to attach any significance to a 90-day estimate?

THE WITNESS: Let me try to answer the question in a full way.

I asked Mr. Schurtman if I could look at that top sheet.

In our business--

MR. SCHURTMAN: Plaintiff's Exhibit 236 for identification.

A In our business, your Honor, we have classified sales historically since I have been with the company, since 1958, into New Release and Catalog.

THE COURT: A little louder.

A We classify sales into two groups: New Release Sales and Catalog Sales. Now why do we do that? We do that because when you are looking at artists' history, you want to look at that artist or those groups of artists with sales for the same comparable period of time.

We pick 90 days as a comparable period of time.

It could be 60 or 120, but that is the number that our company has used.

Now what I would like to point out, though, to help you, I hope, is historically, catalog sales, those that are over 90 days' run, they used to be like 50% of the sales of our company. I would say in the last year they might have been 33% or close to that number. There is a significant sales-- this is after returns, this is net catalog sales.

So when Mr. Zimmerman was testifying yesterday and saying I believe something that when an album stops selling after its first 30 or 60 or 90 days, accounts might be somewhat slow in returning them.

The bulk of those returns may not come in until a year or a year and a half later.

Albums that do well, when an artist -- we have lots of artists whose albums sell,especially if they sell 750,000 units, where they may well continue, especially if the artist has a program recording and the trend is up, that those older albums, catalog sales, are very very significant.

They happen to be the most profitable sales in the whole industry and when you are really done with your big promotion, your advertising effort, you have spent your

fixed cost and it is kind of where you make your highest profit.

Therefore, even though a lot of albums, and the majority of albums, your Honor, the majority of albums that come out in the business, do not make money. The RIAA study - I just happen to recall -- where they call all major record companies and I think it was 72%, but I might be wrong, it could be 70 to 75% of all albums in calendar 1972 did not make money. Like 95% --

THE COURT: I think this is getting --

THE WITNESS: I am deviating a bit. I'm sorry.

THE COURT: What I am concerned with is total sales. I am not concerned with 90-day sales, and I am concerned with total sales after returns.

Now the thing that worries me about a 90-day projection is that I don't know how 90 day sales correlate with ultimate sales after all the returns are made.

I am not interested in a 90-day figure as such. It has no interest at all.

THE WITNESS: The only reason it came up, your Honor, is that in that particular document, which is the only one referring to 90-day sales - - when we do our budgeting, our company -- probably most others, do budget new release and catalog and we break it down to 90 days.

We also project and budget catalog sales. And I wasonly trying to illustrate that it is a significant part of the business and on many albums we do get continuing catalog sales and on many you do not.

THE COURT: OK. Well, I am not going to pursue it but I am just saying I don't at this point have any knowledge of what correlation,if any, there is between a 90-day estimate and ultimate sales. And I won't pursue it.

OK, Mr. Schurtman.

MR. SCHURTMAN: May I ask two questions on that point?

Q When Mr. Granett examined you this morning, you said that your 90-day projection for Mind Games had been 600,000 units.

Now Mind Games, according to your figures ultimately sold net after returns 376,000, which is a little more than half of your projection.

Now, when you made your projection of 750,000 for whatever the next Lennon album was, you did not take into account any returns, did you?

A We took into account the net sales that we knew of at that time. You don't know that on an album like Mind Games that the future is going to have more returns and sales.

Q But forget about Mind Games. On the 750,000 projection, that was for 90 days, and you set up no reserve for returns, did you?

A Nor no plus for catalog sales, if the album sold in the future.

Q And yet in the estimats and the various averages you gave the Court as a basis for your damage claim, you slapped in the entire 750,000 figure without making any attempt to put in a reserve for returns?

A Because when you-- in that one particular example, Mr. Schurtman, which is Exhibit DE, and it is the only one of its kind, and if it doesn't seem appropriate-- that is fine on that one exhibit--we were asked what did we budget to sell that album for.

Now, we budgeted the 750, we didn't put in, as a matter of fact, on Lennon, any returns on that album or any net returns or any net plus sales. We didn't know what the future might have been on that album, but had it sold 750, it was quite possible and maybe likely, that the future would have shown more than 750 rather than less.

Q But, Mr.Posner, what I am addressing myself to, is the validity and propriety of you throwing in that 750,000 figure in your damage estimates.

THE COURT: I don't understand.

Look, I tell you just to save us time, I don't see any need to argue with the witness. I think that the problems with that figure are before me, Mr. Schurtman.

Why do we have to repeat it?

MR. SCHURTMAN: If your Honor feels --

THE COURT: It is a 90-day figure. I know that.

MR. SCHURTMAN: The only thing I am troubled by, your Honor, and I thought I would bring it out through the witness is that I suggest that there is a form of, shall we say, intellectual dishonesty in asking your Honor to use 750,000 as a basis for damages when he knows that the figure doesn't include returns?

THE COURT: That is argument.

What is he going to do, admit to you "I was intellectually dishonest in using this"?

MR. SCHURTMAN: Either that or explain why he did it.

THE COURT: That isn't going to get us anywhere.

THE WITNESS: I object to the dishonest.

As I clearly explained to you, Mr. Schurtman, it might well have been that after 90 days this album would have sold more units than the returns that would be coming in like "Imagine" is. And like many other artists who have strong-selling albums.

And I strongly resent your statement.

THE COURT: Don't resent. This is a lawsuit. It is a war.

THE WITNESS: It is my first time.

THE COURT: OK.

THE WITNESS: Sorry.

THE COURT: Now let's go to something else.

Q All right.

A I do apologize, Mr. Schurtman.

Q One last question about his knowledge.

Did you know what had happened to this projected Oldies album, the fact that Phil Spector had made off with tapes, that production ground to a halt?

A No, I did not.

Q Do you know whether the man who made the projection had any knowledge?

A No, I do not.

Q OK.

Now when you and Mr. Zimmermann discussed the projected Rock and Roll album one year later, in February 1975, he gave you a new set of projections ranging from 300,000 to 500,000.

Now what were those projections based on?

A He took in consideration -- gee, I heard myself

the testimony that there was a competitive album and this album was going to be released awfully quick, our album, and was going to be,in light of this competition which, however good or bad it may be,and he lowered his projection.

Q Well, did you have or did Mr. Zimmermann have any information at that time as to how many albums this so-called competitive album was going to sell or was likely to sell?

A On February 7, when he called him, I don't know what estimate he might have had in his mind, and I think he testified on that, too.

THE COURT: Why don't we ask: Did you ask Mr. Zimmermann?

MR. SCHURTMAN: I did and I could get no answer that I could understand.

THE COURT: I don't know why we ask this witness.

MR. SCHURTMAN: Because this witness then based additional projections on these projections. Everything is like quicksand here.

Q Now did you feel at the time, in February of 1975, that if you lowered the suggested retail price, from $6.98 to $5.98, that you would sell more or less albums?

A Well, as a matter of fact, I asked on that of Mr. Zimmermann and he felt strongly, as I heard him testify, too, that with an artist like Mr. Lennon, really by lowering the price one dollar or the retial price 50 cents or, when it is discounted, whatever, it wouldn't have any effect whatsoever.

That was his professional judgment and so be it.

Q Well, then, why did you lower the price?

A I think he testified on that, too, rather clearly. Didn't you?

Q Do you know why the price was lowered?

A In my opinion?

Q From $6.98 to $5.98.

A In my opinion, the price was lowered because there was the fear that if the,what is it, the Adam VIII package was sold through retail, that it could in fact be sold at a price less than our price to retail and that would put us at a competitive disadvantage.

I don't know at the time whether Mr. Zimmermann knew the exact price that package would come out with. And I would say this, though, I would say this, Mr. Schurtman, that if in fact it turned out that we made a mistake, that the price of the album was such when it came out, that we couldhave sold it at $6.98 had we known that in front, in my

strong view, there would have been no question that we would have come out at $6.98 because our whole purpose is not to try and cut our prices but to make the best profit we can.

So, obviously, he didn't know at the time and he tried his best to be competitive.

Q Mr. Posner, let me ask you this: Did you know at the time or did you inquire from anyone at what price the Roots album would be sold on a television mail order package?

A I did not. And it was not my responsibility. Whatever Don Zimmermann and his people did and talked about--

THE COURT: Did you have anything to do with deciding on the price for the Rock and Roll album?

THE WITNESS: No. I was only asked --

THE COURT: All right.

THE WITNESS: We sell it for less, what would happen -

THE COURT: I think we could go on to something else. We have had Mr. Zimmerman here and Mr. Menon and they were the ones who did the deciding.

MR. SCHURTMAN: They said they had consulted with Mr. Posner.

hb:mg 13 Posner-cross

THE COURT: For certain specific information.

Q Well,what information did you give them?

THE COURT: He has already testified.

MR. SCHURTMAN: Your Honor --

THE COURT: What I have got to avoid is niches in which each witness fits and I don't see that we gain a lot by asking Mr.Posner to speculate what was going on in Mr. Zimmermann's mind.

He will probably just end up repeating Mr. Zimmermann's testimony.

MR. SCHURTMAN: I am not asking him that. I am asking him what did he do.

THE COURT: He has already told you.

MR. SCHURTMAN: Apparently Mr. Zimmermann made the projections; Mr. Zimmermann fixed the price. What was his role in all this? I just don't know.

THE COURT: The record shows it. I don't know why we can't keep this in mind. He provided answers to the question about whether Capitol could make a profit at a $5.98 price at any of the projected sales levels.

Is that what you did?

THE WITNESS: Yes, sir.

THE COURT: He so testified yesterday afternoon.

That was your only function?

THE WITNESS: Yes, sir.

Q Let me show you Exhibit DA for identification. Is this in your handwriting?

A Yes, sir.

Q Can you tell me what "CONTR." means?

MR. GRANETT: I object to this. It was withdrawn; it is not an exhibit.

THE COURT: What is this?

MR. GRANETT: This is a paper that was marked for identification and was withdrawn.

THE COURT: Mr. Schurtman wants to ask him about it. He is perfectly privileged to do so.

Q What does it stand for?

mmbr 2 Posner-cross

A It is an abbreviation for the word "contribution."

Q What does contribution mean in this context?

A To fixed overhead costs.

Q Contribution by whom?

A By the sales of that album after you got the costs, the variable costs, as related to the album, and the fixed costs that you have to incur, like packaging costs and whatever recording costs that are fixed, that is what is left. But another way of saying that, Mr. Schurtman, that is the profit before the application of overheads, the estimated profit.

Q And you prepared this memo on February 7th and gave it to Mr. Menon?

A I did not give it to him. He was in New Orleans.

Q Sent it to him?

A Yes, sir.

MR. SCHURTMAN: I would like to have this marked in evidence, please.

MR. GRANETT: No objection. It was offered by Capitol yesterday.

(Plaintiffs' Exhibit 237 was received in evidence.)

MR. GRANETT: I have a copy for the Court.

THE COURT: This is the same as Defendants' Exhibit DA?

THE CLERK: It is now Plaintiffs' Exhibit 237.

Q Just one more clarifying question. I assume DLR refers to dealer price?

A Correct.

Q Is that the retailer who sells your album to the public?

A Yes.

Q And what does the thing underneath DLR say?

A It is S/D, which means sub-distributor price.

Q Did you have anything to do with the decision made by Capitol to compete against Roots?

A No.

Q Do you have any knowledge as to why that decision was made?

THE COURT: Mr. Schurtman, this is not discovery. You had witnesses here. We can have other witnesses at request who have knowledge of that. I think that this man has a function in the court: there are certain things he can help us with and other things he can't.

MR. SCHURTMAN: It may be that Mr. Menon or Mr. Zimmerman told him the reasons.

THE COURT: This is not discovery.

MR. SCHURTMAN: It is not intended to be discovery; it is intended to bring out a point.

THE COURT: That is what it is turning into.

MR. SCHURTMAN: If he has any information as to why the decision was made.

THE COURT: Did somebody consult you and advise you and tell you of the reason?

THE WITNESS: I was at a meeting I guess right around that time and the thought was that we ought to get our album out as quickly as we could.

Q Was there any discussions as to why, in other words, why couldn't you stick to your release schedule and wait to see if your telegrams regarding the Roots album were effective, or something else would happen?

A On that point I do not recall to the best of my recollection any discussion that I have heard.

THE COURT: Is Mr. Coury still at Capitol?

THE WITNESS: No, he not, your Honor.

THE COURT: Where is he?

THE WITNESS: The latest word is -- I don't know if it was published or not -- if he is going to be with another record company. I believe he will be located in Los Angeles. He lives in Los Angeles.

Q Do you know why he left Capitol?

MR. GRANETT: I object to that, your Honor.

THE COURT: Sustained.

Q Did it have anything to do with this suit?

MR. GRANETT: Objection, your Honor.

THE COURT: I just want to know the whereabouts of a potential witness. Let us go on and keep on the track. Next question.

MR. SCHURTMAN: I am trying to cut out some questions to save time, your Honor.

Q Do you have with you the sales figures of the first four Lennon albums?

A I have sales figures of three albums that were talked about yesterday. I am missing one album.

Q Can I have the sales, please, for those three albums?

MR. GRANETT: I object to the use of the expression "Lennon albums," because they are not really Lennon albums.

THE COURT: What are you speaking of, Mr. Schurtman?

MR. SCHURTMAN: I am speaking about the Wedding album, the four albums that we marked as exhibits yesterday.

MR. GRANETT: There were three marked.

mmbr 6 Posner-cross

THE COURT: Well, the Two Virgins was really one of them, too. The Two Virgins, Life with the Lions Unfinished Music No. 2, Wedding album, and Live Peace in Toronto is what I have got written down.

MR. SCHURTMAN: Those are the four.

THE COURT: What is your question, Mr. Schurtman?

MR. SCHURTMAN: : Whether he can give me the sales figures.

MR. GRANETT: I object to these being referred to as Lennon albums.

THE COURT: Objection overruled.

A I have the sales figures of the three albums that were distributed by Capitol, but not the Two Virgin album.

Q Give me the three albums.

A The United States sales figures are 51,500 --

THE COURT: Can you give us the name of the album?

THE WITNESS: I am sorry. The first album is Life with the Lions Unfinished Music No. 2, released May, 1969 --

THE COURT: Can you speak up just a little bit.

THE WITNESS: I am sorry -- with sales of

51,500 net U.S. units.

THE COURT: Next one.

THE WITNESS: Was The Wedding album, released in October, 1969, with net unit sales of 22,500 and the third one is Live Peace in Toronto, released December 1969, with sales of 389,000 units.

THECOURT: The date of release again?

THE WITNESS: December, 1969.

THE COURT: And sales again?

THE WITNESS: 389,000.

THE COURT: Give me a minute.

(Pause.)

Q Will you look at Exhibit DD --

THE WITNESS: Your Honor, this may be improper, but I really feel uncomfortable discussing these sales numbers with so many people in the audience, the public. I don't know if I have a right to say that, but --

THE COURT: This is practically old history by now and this is a public trial and I just really think unless there is a showing of a present competitive problem and if your competitors were here, I might worry about it.

Go ahead.

Q Would you take a look at Exhibit DD, which is the revised version of Lennon's United States unit sales

history and on which you base certain averages. Have you got them in front of you?

A Yes, I do.

Q Would it be fair to say that the Imagine album, which sold 1,153,300 was really Lennon's last big, big hit, and since then it has been quite a bit downhill?

A Well, that is what has happened.

Q I think there was testimony yesterday -- and I can't recall if it came from Mr. Zimmermann or you -- who said that Imagine was a sort of watershed in Mr. Lennon's career and that he had to start, in effect, picking up the pieces again after that.

MR. BERGEN: That was not the testimony at all.

THE COURT: Yes, I will sustain the objection to that.

Q In order to get up a fair average, shouldn't the last big hit, the last two big hits, be excluded and you start again with Some Time in New York City?

MR. GRUMBACH: I object to that question. An average is an average.

THE COURT: I will overrule that objection.

Read the question to the witness.

MR. SCHURTMAN: Let me do it another way.

Let me mark this Plaintiffs' next exhibit for identification.

(Plaintiffs' Exhibit 238 was marked for identification.)

Q Let me show you Plaintiffs' Exhibit 238 for identification. Now, what I have done with that exhibit is to total the same approach you did in your exhibit, except I excluded the first two albums. I have included Some Time in New York City, Mind Games and Walls and Bridges. I come up with an average of 321,667.

MR. GRUMBACH: I object to the question, your Honor.

THE COURT: Overruled.

Q Now, do you have any objections to this approach, and, if so, what are your reasons?

A Averages are, you know, really averages, and it is difficult at best with an artist who had a career where you had big successes and you had albums of a lesser stature, it does show you that an artist, such as Mr. Lennon, certainly has a shot, a fair, reasonable chance of having good sellers, strong sellers and weak sellers. I did not try to make a judgment for anyone when I took five albums and I said that is a perfect example of what his next album would do. I just said if you took the five albums,

that is what the average is. If you feel inclined to take any other albums, that could be your judgment. I will say that I used the three albums at one point, and the linear trend analysis which was disregarded, and I personally felt was a little weak, because I was trying to show that the artist has a trend up on these three albums, and we hoped it was going to continue, that each album would sell more.

Q Do you have any specific reasons to include Some Time In New York City?

A I think it unfair. It has been testified it was not what you hope it would be a rather typical album of Mr. Lennon's, and I could only collaborate the testimony that was given by Mr. Zimmerman.

(Pause.)

am

Q You have indicated that Some Time in New York City, in your opinion, was not a representative Lennon album.

Would you consider Mind Games and Walls and Bridges representative Lennon albums?

A We certainly should because they were released.

THE COURT: You stand close to each other and you talk to each other and nobody can hear.

Q All right.

Do you consider Mind Games and Walls and Bridges as truly representative Lennon albums?

A I do. Along with Plastic Ono Band and also as a Lennon album, although not, although much more successful, we should say, that Lennon can produce an album like Imagine -

THE COURT: Would it be possible to -- I don't have any particular feel of the character of the music -- is there any way that we can give-- play something to illustrate the character of these different albums?

MR. SCHURTMAN: I think Mr. Bergen has the intention of playing a lot of albums and if he leaves out some of those, I will play the others.

MR. BERGEN: No, I only have the intention of playing the Rock and Roll album and the Roots album; nothing else. But if your Honor wants to hear some of the other

ones --

THE COURT: I don't know. The difference in character is, particularly between -- what are we talking about? We are talking about albums of music. They are not just names with a lot of statistics. It is music, and I don't have any -- I have never heard it.

MR. SCHURTMAN: Apparently the approach is if it sold little it is not a genuine Lennon album?

MR. BERGEN: That is not an approach at all. We are arguing -- he knows perfectly well what the distinctions are.

MR. SCHURTMAN: Your Honor, let me -- after I finish with these statistics and so on, and if your Honor wants to listen to a few excerpts from each album, we will do it.

THE COURT: Sure.

MR. SCHURTMAN: Or should we do it now?

THE COURT: Any time you want to, I am interested in hearing it.

MR. SCHURTMAN: Then let me hit a few numbers first and then get into it.

Q All right.

I have prepared another exhibit - maybe you can hand up a copy to the Court, in which I have taken out

Some Time in New York City without necessarily conceding it should be taken out, and I have put in Mind Games and Walls and Bridges. And there you come up with an average of 400,500, and it also shows that Rock and Roll sold 14.6% less.

Do you have any specific objections to this kind of an approach in fixing averages?

A It certainly takes the last two albums and makes an average of them. I did point out that Lennon's other typical albums are better than that.

Q Some are better and some are worse?

THE COURT: Do you regard Some Time in New York City as not a typical album?

THE WITNESS: Yes, your Honor.

THE COURT: I mean,what is it that makes something typical or untypical?

THE WITNESS: I think the best, if I might say, sir, would be to kind of listen to it yourself. I didn't mean it quite that way.

THE COURT: That's why I thought it would be a good idea. In other words, it depends on the music or the lyrics or something in the content, right?

THE WITNESS: Yes, sir.

Q All right. Well, maybe this would be a good time

to listen to four excerpts.

THE COURT: All right.

MR. SCHURTMAN: May I just offer these averages in evidence on the same basis that the other averages were offered?

THE COURT: I will receive them, 238 and 239.

xx (Plaintiff's Exhibits 238 and 239 received in evidence)

THE WITNESS: May I volunteer something?

THE COURT: OK.

THE WITNESS: I'm sorry. Since I went to the trouble of getting these sales of the three previous albums, Life with the Lions -Unfinished Music No. 2 and the Wedding Album and the Live Peace in Toronto, I also did one other thing.

Granted that they are slow sales, the first two albums, I inquired as to what Canada sold just to see whether they were typical, and I might tell you that on the first album, Canada--

THE COURT: You wait to get asked. Let's not get into Canada unless somebody asks you. OK.

MR. SCHURTMAN: What would your Honor like to hear first?

THE COURT: I have a qusetion. I want to know

whether I am supposed to have--

MR. SCHURTMAN: Well, let's play a song from Mind Games.

THE COURT: All right.

MR. SCHURTMAN: And then a song from,what was the other one, Walls and Bridges?

MR. BERGEN: Why don't you play Imagine?

MR. SCHURTMAN: Let's play Imagine.

THE COURT: Play them all in order.

What about Plastic Ono Band?

MR. SCHURTMAN: Let's play them in sequence.

THE COURT: Fine. I think that would be the most helpful thing.

MR. SCHURTMAN: Start off with -- I was about to say Two Virgins, but I won't. Let's start off with Unfinished Music No. 2.

THE COURT: OK.

MR. BERGEN: First I want to make an objection. These are not Lennon albums there has been testimony about. They have other artists on them. There are some portions of those albums that are not even music, that's why they are not Lennon albums.

THE COURT: The best way to illustrate that is to play them.

MR. SCHURTMAN: Perhaps you should look at it. The only other artist mentioned on it is Yoko Ono.

MR. BERGEN: That's another artist.

MR. SCHURTMAN: She's been on other albums, too.

MR. BERGEN: But not on Lennon albums.

THE COURT: I am not going to hear the whole thing but somebody ought to have an idea of what is representative here.

MR. SCHURTMAN: Play an excerpt from each.

All right. For the record, let's start off with Side One, Unfinished Music No. 2, Life with Lions.

MR. GRANETT: Your Honor, may the witness leave the stand?

THE COURT: Yes, certainly.

Now what are you playing, Side One?

MR. SCHURTMAN: Side One, Unfinished Music No. 2, Life with Lions, John Lennon and Yoko Ono.

MR. BERGEN: There aren't any tracks on this side, kit just says one, Cambridge 1969.

THE COURT: All right.

(Music played)

MR. BERGEN: There are no other-- there is just -- there aren't tracks on this, there aren't different songs.

THE COURT: Just don't get worried, Mr. Bergen.

It doesn't hurt to play a little music.

MR. SCHURTMAN: This is the reverse side.

(Music played)

MR. SCHURTMAN: Move to another track.

THE COURT: OK.

(Music played)

THE COURT: OK. What is the next album?

MR. SCHURTMAN: Wedding Album is next.

MR. SCHURTMAN: That one we only have tape.

MR. BERGEN: There isn't a record, it was just a tape.

THE COURT: Well, I guess we can't play that.

MR. SCHURTMAN: All right. The next one is Live Peace in Toronto.

(Record played)

THE COURT: Is this Rock or what is it?

MR. SCHUTMAN: That is what I wanted to ask.

MR. LENNON: It is all rock.

THE COURT: This is not Rock and Roll?

MR. BERGEN: That is an old rock and roll song from the 1950's that was made famous by a singer named Carl Perkins.

THE COURT: What is the name of the song?

MR. BERGEN: Blue Suede Shoes.

MR. LENNON: And Elvis Presley.

MR. SCHURTMAN: Would you say this is the same type of rock and roll music that was on the Rock and Roll album?

THE COURT: In other words, there's one rock and roll song on there?

MR. BERGEN: There are several.

The other distinguishing factor, aside from what you are about to hear, which makes this album a lot like --

THE COURT: It is very important to me to understand what the songs are.

(Music playing)

MR. BERGEN: Can we put Mr. Lennon on the witness stand?

THE COURT: Could you come up?

MR. LENNON: Yes, sure.

Am I still sworn?

THE COURT: You are still sworn.

(Mr. Posner temporarily excused)

J O H N L E N N O N, resumed:

THE COURT: The first piece we played, Live Peace in Toronto, what is the name of that?

THE WITNESS: Blue Suede Shoes, and it is a '50's rock and roll song similar to the Rock and Roll album and

Roots, similar kind of material, the only difference being that this was a live concert.

THE COURT: I see.

Now are there other rock and roll songs on that album?

THE WITNESS: There are two others, sort of standard rock and roll songs from the '50's.

MR. SCHURTMAN: Do you want to hear them?

THE WITNESS: Shall I just --

THE COURT: Just a second.

THE WITNESS: Finish these questions?

The other songs on the record are either written by myself or Yoko. Side Two is in fact Yoko singing. I wouldn't term it rock and roll,sort of avant garde mixed with rock and roll.

MR. BERGEN: Can we just get on with the record, what the other two rock and roll songs are?

THE WITNESS: There is one called Money. And there is one called Dizzy Miss Lizzie, which I had previously recorded with The Beatles. But I re-recorded it at this live concert just because I knew the song.

THE COURT: OK.

Can you just explain to me what the difference between rock and roll and rock is?

THE WITNESS: It is the same.

THE COURT: It is the same?

THE WITNESS: You see, when people say rock and roll, they tend to be thinking about the '50's, but practically any record that is on the radio, it could be called rock and roll.

The term has broadened over the years. Actually it is a specific type of music, but you call anything with a beat rock and roll or rock music. They just call it rock for convenience rather than rock and roll.

THE COURT: Could you start the album over and play a little bit of the three rock and roll songs?

(Record played)

THE COURT: Is this Money?

THE WITNESS: Yes.

(Record played)

THE WITNESS: This is Dizzy Miss Lizzie.

THE COURT: Can we hear some of the other types of songs by Mr. Lennon or ---

MR. SCHURTMAN: I will move on further.

(Record played)

THE COURT: Is this a song by you?

THE WITNESS: Yes.

THE COURT: Is there any other type of music on

there?

THE WITNESS: Yes. The first side is all straight songs, the second side gets a bit wild.

MR. SCHURTMAN: This is the last song on the first side.

(Music played)

MR. SCHURTMAN: That was the first side.

THE WITNESS: There is only two tracks on the side two.

MR. SCHURTMAN: I will stick it in the middle.

(Music played)

THE COURT: This is all the concert at Toronto?

THE WITNESS: Yes.

MR. SCHURTMAN: I will move on.

THE WITNESS: I don't even know if it stops and goes into another track. We might have just put two titles on one piece.

MR. GRUMBACH: There is no division.

THE WITNESS: That's the end.

THE COURT: Just for curiosity, when you produce a record of a concert, do you edit it and go through the same things that you told me about before?

THE WITNESS: Yes, you have less scope because a lot of it leaks on. You can't separate the tracks and beneath

so you have a harder time with it. If there is nothing there to work with -- but you can do quite a lot of work in the studio.

MR. SCHURTMAN: Your Honor, could we ask Mr. Lennon what the Plastic Ono Band is?

THE WITNESS: Be happy to explain.

Plastic Ono Band is a conceptual group, it doesn't exist, meaning that whoever plays with either myself or myself and my wife or Yoko separately is called the Plastic Ono Band, meaning if we made a record now in the courtroom, and we just all sang together, I would call that Plastic Ono Band. So anybody is the Plastic Ono Band, even the audience. That's why Capitol can't sign them up.

THE COURT: The Plastic Ono Band is thenext one.

MR. SCHURTMAN: Except Live Peace in Toronto does say on the label Plastic Ono Band.

THE COURT: But there is an album called Plastic Ono Band. Let's have the album.

THE WITNESS: That has a green cover. That's Life with Lions, again.

MR. SCHURTMAN: I am sorry. The Plastic Ono Band has been marked.

THE COURT: SW3372.

THE WITNESS: That's the Mother album, it's got

a tree on the front, and me sitting under the tree.

If it helps, I refer to that album as Mother because it's got a song on it called Mother and everybody got confused because I never gave it a title, so we called it Mother for short.

This album was the first solo album I made after leaving The Beatles that weasn't either with my wife or avant garde. This is the first straight album.

MR. GRUMBACH: The first track is Mother.

(Music played)

MR. SCHURTMAN: Do you want me to move it on?

THE COURT: OK.

THE WITNESS: That's just a straight album.

MR. SCHURTMAN: Your Honor, could we ask Mr. Lennon whether he wrote this song?

THE WITNESS: Yes.

MR. SCHURTMAN: That is something you wrote?

THE WITNESS: Yes, unless it is stipulated, most of it will be written by me, yes. It is all written by me. I think maybe Yoko helped me on one song or something. I would have to look at the credits. In general, I would guess I wrote them all.

THE COURT: Now when you say wrote it, you wrote the lyrics?

THE WITNESS: And the music, yes. I always do both, yes.

MR. SCHURTMAN: As your Honor knows, we regard that as a significant point that this was Mr. Lennon's own material.

THE COURT: Are we going to hear any more of this? Let's hear a little bit --

MR. SCHURTMAN: I will go to the middle.

(Music played)

MR. SCHURTMAN: Flipping it to Side Two.

(Music played)

MR. SCHURTMAN: Move on to the middle, Judge.

THE COURT: OK.

(Music played)

THE COURT: Which one is this?

THE WITNESS: "Well."

THE COURT: Why don't you play the last one on this side?

(Music played)

THE COURT: The very last one.

(Music played)

MR. BERGEN: Can we just have on the record that that song is 48 seconds long?

THE COURT: All right.

THE COURT: Now the next one is --

MR. SCHURTMAN: The next one is Imagine, the big one.

MR. BERGEN: One side has the lyrics, the other side has who appeared on the album.

(Music played)

THE COURT: I think this machine is warped.

(The following took place during the playing of the records.)

THE WITNESS: There is one difference. Some Time in New York, besides the fact that my wife is on the singing sort of regular songs, it is not avant-garde, which is the first time I think we did that together. There are two albums, and one of them is a live performance with Frank Zapa at Fillmore East, which is pretty far out.

THE COURT: Part of it is --

THE WITNESS: There are two complete albums on Some Time In New York City. One of them is a live performance with Frank Zapa, which starts off as a straight rock and roll song, and then goes into madness. So there is one avant-garde album and sort of one political rock and roll album. One is avant-garde, sort of a political rock and roll.

MR. BERGEN: Two versions of the same album.

THE WITNESS: I look at the poliitcal rock side as a documentary.

THE COURT: When was Some Time in New York City issued?

THE WITNESS: That came after Imagine.

MR. SCHURTMAN: June, 1972.

THE WITNESS: Imagine is like a full length feature

film, and Some Time in New York is like a documentary; it is like Attica and Angela Davis, and so it is more like a newspaper than a record, and that is the difference.

Also, Yoko is singing on it.

THE COURT: Now, what have you got?

MR. BERGEN: Side 1, Women is the Nigger of the World.

THE COURT: This is the album that you call political rock?

THE WITNESS: Yes, the single from "Woman is the Nigger of the World." It was controversial because of the word "nigger" and there was a lot of talk like that, and I was on the Dick Cavat show trying to sing it and ABC stopped me and then let me. Capitol wasn't too happy, and I was not too happy, but I made the record and so I stood by it.

MR. SCHURTMAN: The witness said it was a documentary, but we establish that the record we just heard was a song, and not something spoken.

THE COURT: I think it was a kind of a figure of speech. Let us hear a little more.

Was there a basic idea in Mind Games?

THE WITNESS: Confusion is the concept behind it. Not really. It was a sort of transition for me.

THE COURT: Transition from what?

THE WITNESS: Sort of political music, back to my own kind of music. I had been through a phase, and so Mind Games to me was confusing. So there was no concept behind it, but it was my normal way of working, just writing ten songs and recording them.

THE COURT: Let's hear a couple more, a little bit more Mind Games, and then we will go on until we finish before lunch.

I asked Mr. Lennon the conceptof Mind Games and he was explaining. So we will have another record.

THE WITNESS: The concept is really in the cover, which has a figure of me. Now, if you twirl the album, which is what happened in the store display, my figure moves, and when I say confusion I am sort of alone in the field and with a little suitcase and in the middle of nowhere. That is what that album was all about -- nowhere.

THE COURT: You said it was a transition from political music to normal music?

THE WITNESS: At the time, just like a painter, you would see him coming out of his blue phase into his pink phase, and it was neither blue nor pink, it was sort of blink.

(Walls and Bridges played.)

THE COURT: Are the lyrics anywhere in this?

MR. BERGEN: There should be a folder in there.

THE COURT: We will recess until 2:15.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

MR. GRANETT: May it please the Court, during the recess we acquired a disc copy of Wedding Album.

THE COURT: All right.

Why don't we-- don't we have all these marked as exhibits?

MR. BERGEN: We can mark this as Defendant's -- why don't we mark it as CB-6, and may we also move its admission into evidence?

THE COURT: I will receive it.

(Defendant's Exhibit CB-6 received in evidence)

MR. BERGEN: I am going to play Side One.

(Record played)

THE COURT: Are there any regular songs?

MR. BERGEN: I am just going to put it on the other side. I don't think there are.

(Music played)

THE COURT: Now, I think this is very helpful to get the idea of the character of the albums.

I think you were going to do something with Rock and Roll anyway. Now maybe we better wait on that.

MR. BERGEN: I can't do it right now, your Honor.

THE COURT: All right. Fine. Well, I have heard

the Rock and Roll album anyway.

Why don't we do Shaved Fish? OK.

MR. BERGEN: Your Honor, Shaved Fish is really just a compilation album. It is a compilation of the songs from the albums we have already heard.

THE WITNESS: And a few extra singls that were never on albums before.

It's got Imagine and half of the tracks on other albums.

MR. BERGEN: Your Honor, if I just show you the album cover, the album cover--

THE COURT: But obviously there are kind of characteristic songs of Mr. Lennon that appear in Mind Games, Walls and Bridges and so forth.

MR. BERGEN: That's correct.

THE COURT: Shaved Fish and then there are the avant garde things that are quite distinct.

Now --

MR. BERGEN: This album is really just as it says on the front, it says "Collectible Lennon." They are really just songs from the other albums that have been put together.

THE WITNESS: That is not quite correct.

THR COURT: Well, OK.

MR. SCHURTMAN: They are all Lennon songs, aren't they?

MR. BERGEN: That's correct.

THE COURT: If anybody wants to play it, I think I can kind of get the idea from the titles -- do you want to play any of this, Mr. Schurtman? I don't think I need it.

MR. SCHURTMAN: If you don't think you need it. I am still not sure I understand what distinctions are being made here.

THE COURT: You are a lot smarter than you let on.

Now, look, there is a distinction between the Wedding Album and Walls and Bridges.

MR. SCHURTMAN: But which way does the distinction cut, your Honor? If somebody foists the Wedding album on the public, do you want to draw certain conclusions from this?

THE COURT: It isn't a matter of foisting. I don't think we have to get into argument about it, but there are obvious differences in sales and a particular type of album had a popularity that another type of album did not.

MR. SCHURTMAN: Well, what about Some Time in New York City, because that isn't avant garde. That consisted

of two records and some of it was good solid rock and roll music.

THE COURT: Well, some of it was.

MR. SCHURTMAN: Some of it was so-called political rock but so was Shaved Fish.

THE COURT: We are not going to try to resolve that now, but I just want to see what would help.

Mr. Lennon, if you can take Shaved Fish and just testify about it, the character of it, what is on it.

THE WITNESS: Here? On the seat here?

THE COURT: Yes.

THE WITNESS: Just --

THE COURT: Any way you want to describe it.

DIRECT EXAMINATION

BY MR. BERGEN:

Q Why don't you describe what the album is?

A Shaved Fish is a repackage, as it is referred to inthe trade, meaning as tracks that have been out before or songs that have been out before, but the actual same record that is out. It is not a new version of it, it is the same as the record.

THE COURT: Was it weighted in the kind of -- well, you characterize it.

THE WITNESS: On this repackage, this specific

one, I chose all the records that I had put out as singles whether they were from albums, or were specifically made just as singles. For instance, a couple of tracks here like Happy Christmas War is Over had never been on any album before.

Instant Karma had never been on any album before. And a couple of more tracks had never been on albums.

But other things like Woman is the Nigger of the World, Mother, Imagine, Whatever Gets Through the Night, Mind Games, No. 9 Dream -- that had all bee on albums before.

A couple of them had been on albums, different versions of the same song had been on albums like Give Peace a Chance. I had a few versions of that. But in general, everything-- these were the singles as I released them over the past five or six years.

MR. SCHURTMAN: May I ask a question?

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q You told the Court this morning that when you did Some Time in New York City, it was part of your political period, so to speak, and then you got away from thepolitical period?

A Well, sort of, yes.

Q Now looking at Shaved Fish, let me just run down the titles.

Wouldyou say Give Peace a Chance is one of your political songs?

A I think you could include it, but it was more - - less political than Power to the People and some other tracks which followed later on.

Q Let's look at the tracks on Shaved Fish.

pm

THE COURT: I may have lost something. You say you chose the songs that had been issued as singles?

THE WITNESS: Yes, and some of them had never been on albums.

THE COURT: Now, as far as the character you were describing in your own terms this morning, avant-garde, crazy, whatsoever, how would you describe the general character or individually, however you want to do it, of the songs in this album?

THE WITNESS: I would describe them as fairly straightforward, apart from the two political ones, which I use one-half of on this album. I use about 20 seconds or maybe a minute of Give Peace A Chance, because it was a single record, but I didn't think it was necessary to play the whole thing again.

THE COURT: What about Woman?

THE WITNESS: I didn't like some of the lyrics I had written. It wa done in a hurry. I cut out about a minute and a half or two minutes from "Woman is a Nigger".

MR. SCHURTMAN: Your Honor, I was asking which are the political songs.

THE COURT: I interrupted you. I will come back to you, but I want to get his answer to my question.

THE WITNESS: Well, I edited Woman is a Nigger.

It is like someone, when they re-edit a book.

THE COURT: What is the total number of songs?

THE WITNESS: 11 and the Reprise. There is Give Peace a Chance twice. That is one.

MR. SCHURTMAN: Between 11 and 12.

BY MR. SCHURTMAN:

Q Give Peace a Chance you would say is sort of political?

A Yes, because it is in a different frame of mind to Power of the People.

Q What kind of song is Cold Turkey?

A It is just a song.

Q Rock and Roll?

A Well, they are all rock and rolls; some are political rock and roll. Everything I do is rock and roll.

Q You count Mind Games and Imagine in there?

A Imagine is a slow rock number.

Q Do you distinguish between country style rock and hard rock?

A There are so many degrees. We can go on forever. But in general I call it rock.

Q Let's go back to Shaved Fish. What style is Instant Karmar?

A You know what Karmar is?

THE COURT: No.

THE WITNESS: It is an eastern thing, karmar. We are all here because of Makar. It is just a song.

Q What is Power to the People?

A That is a definite political one.

Q And Mother?

A I would call that autobiographical.

Q Woman is the Nigger of the World?

A That would be political.

Q Imagine is what you call slow rock?

A Yes, with a little politics, but not with sugar in it. It is hard to describe.

Q And Whatever Gets You Through the Night?

A That is easy come, easy go.

Q Mind Games?

A That is just rock and roll.

Q No. 9, Dream?

A Rock and roll.

Q Happy Christmas, the War is Over?

A That is a little touch of each, perhaps, although it is namely a Christmas song, it does have a little catch line about the war is over. You could see it is a peace song.

Q How about the little legend on the cover, "A conspiracy of silence speaks louder than words"? Is that a political slogan?

A No, that is philosophy, and you will find a statement on each record I make either by me or a friend of mine.

MR. SCHURTMAN: Do you want to hear any other records at this point?

THE COURT: No. You can step down.

Finish with Mr. Posner.

(Witness excused.)

MR. GRANETT: Before Mr. Posner is recalled, do you have any idea how long you intend to sit tonight?

THE COURT: Well, I did not intend to sit very late. I have actually got a Judge's meeting at 4:15, which I would like to go to, unless somebody has got to catch a plane. I was planning on sitting tomorrow. I would like to stop at 4:15, unless somebody has got a desperate engagement.

Is there any problem with that?

MR. GRANETT: I just want Mr. Posner to plan reservations for 7:30 tonight.

THE COURT: If you stop at 4:15 you could make it.

MR. POSNER: Absolutely, your Honor.

MR. GRANETT: The question is, will we be through with him by 4:15?

THE COURT: Let's try.

H A R O L D P O S N E R, resumed.

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q I believe there has been testimony that one reason why Rock and Roll did not achieve higher sales was because of the alleged interference by Roots. Now, my question to you is whether any other factors which in your opinion in your experience would account for any decrease in the sales of Rock and Roll?

A No. Ifyou include in this interference the poor implementation of the marketing plan that was discussed at length.

Q Now, let's consider for a moment the state of the economy. There has been testimony by other witnesses that Capitol Sales had fallen off substantially during this period, that the kids didn't have enough money to buy records, and that the economy was in a state of recession.

In your opinion did this have any adverse influence on the sales of Rock and Roll?

A Well, that is a good point, Mr. Schurtman, and

I can't say for a fact, but it might have had some. Generally, though, what happens in my experience, in a period of recession which we had before in the past in the record business, the acts that suffer, that really get hurt are the newer acts that you are trying to develop, the acts that are not really established.

The kids become more selective as to where they spend their money. But if you have a good album, like a major star, whoever you want to name, Elton John, Paul McCartney, John Lennon, if it is a good Lennon, it will be hurt far, far less. I would not say to you it would not be hurt at all. I would say it would be very minimal on Mr. Lennon.

Q Is it a fact that Capitol sales overall did decline during that period?

A That is a fact.

Q They declined quite substantially, did they not, by about 25 percent?

A I believe -- give me a second --

THE COURT: We have already had that, Mr. Schurtman.

MR. SCHURTMAN: I will pass on to something else.

THE WITNESS: It was more like 14 percent.

Q 14?

A Between fiscal '75 and fiscal '74, but it still is a significant percent to us.

Q Now, have you given any consideration to the fact that the critical reviews of Rock and Roll were not very favorable?

MR. GRANETT: I object to the question. That is a characterization. That is not necessarily true.

MR. SCHURTMAN: Shall I show him the critical reviews?

THE COURT: No, let's not get into that.

Did you know about what reviews there were of the Rock and Roll album?

THE WITNESS: I don't read the reviews. I just knew that there were some bad reviews and there were some mixed reviews.

THE COURT: To the extent that you knew about this situation did you think this had an effect on Rock and Roll sales?

THE WITNESS: Your Honor, I really believe strongly in what was testified before, that many times albums by major actors get poor reviews and it does not really hurt. It is really what is in the album that counts and how it appeals to the kids.

Q Can you tell us, based on your experience, how

people go out and buy these albums? What considerations influence them? How do the kids know what is in an album?

MR. GRANETT: I object to this line of questioning. He has not been qualified as an expert in marketing of merchandise in the sense of knowing what sells and what does not sell.

THE COURT: I asked him about that yesterday and he said he had some experience and knowledge. So let us see what he can say about it and then let us see what the limits are, and then, obviously, he can't go any farther.

Anything you don't know about, don't speculate about. Tell us your knowledge and the extent of it, and that is it.

THE WITNESS: Certainly.

Air play, the extent of it, or the very exposure and the extent of it is one way that the buying public hears about the product. And, also, what you try to do in the indoor displays, you try to get a little more momentum in the marketplace. Also, kids really talk to each other a lot, and if one person has had the album, another one hears it.

Q Let me just ask you on that last point:

mmbr 9 Posner-cross

Would you attribute a great deal of weight to word of mouth advertising?

A I don't know what a great deal of weight is.

Q You think it is a significant factor?

A I don't know how significant it is.

Q What other factors influence people in purchasing albums at this time?

A Some people contend that the cover, the way the album appears to the public, has a bearing, and that is probably true, especially maybe so on newer actors. But, again, if you have an established actor, the cover is important to a certain degree. I can't say how much. Obviously, a poor cover is not a help. A good cover is a help. But I think that is about all I can really say, Mr. Schurtman.

Q When you first considered this album in February, 1974, was there any discussion about this being timed to meet the nostalgia craze to rock and roll?

A If there was I was not part of the picture.

Q Do you have any information as to whether or not the nostalgic craze was still in full swing a year later, in 1975?

A I really could not say again anything different than Mr. Zimmerman said on that.

Q You have no views of your own? Do you know whether Mr. Lennon expressed concern that the album was timed too late to hit the nostalgia craze?

MR. GRANETT: I object to that as calling for hearsay.

THE COURT: Well, he is part of Capitol. I will allow it.

A No, I didn't hear it.

Q Did anyone ever tell you that Mr. Lennon had expressed a far that if this album were to be put out in the regular way the critics were lying in wait for it and would pan it?

MR. BERGEN: I object to this. This is not cross examination; this is discovery. He didn't testify to any of this.

MR. SCHURTMAN: This witness has testified that the only thing that hurt the sales of this album in his opinion were whatever Roots did; nothing else hurt: recession didn't hurt; nothing hurt.

Now, I am entitled to probe.

THE COURT: The thing that worries me, Mr. Schurtman, he was brought here as a witness about projections, about calculations. Maybe it was a great mistake, but I brought up the subject of evaluation, of what

might have hurt the market for Roots. I am not sureanybody else. But these are questions, really, which were most appropriate to Zimmermann. I don't want to be in the position of being told you are desperately rushed. We have only time to get into the financial facts with him. If you want to cover with him the profit figures and that, let us get to that, because that is the essential part of his testimony.

As far as this other, he is not at the center of the marketing.

MR. SCHURTMAN: If he is on the stand as sort of a talking calculating machine, that is one thing, but I thought they put him on the stand as one of the people who will tellyou why they were hurt.

THE COURT: You can read the testimony, and I am sure you remember it. He had a particular role to play and he was brought for a particular reason.

Let us get to that.

MR. SCHURTMAN: I will move on.

Q Did you make a budget projection in 1975 for any Lennon album?

A I myself did not make a projection.

Q Did Capitol?

A Yes.

Q Do you have it with you?

A That is the 750,000.

THE COURT: In 1975?

THE WITNESS:No, in our budget for fiscal 1975 I am almost 100 percent sure that we had no Lennon album.

THE COURT: I think what he is talking about is that calculation or projection.

MR. SCHURTMAN: I am trying to find out if they made the same type of projection which he made in 1974 which was for Rock and Roll. Did he make the same thing a year later?

A In our budget for fiscal 1976, which is the year we are in, which we would have budgeted in the spring of 1975, at that time we did not put a Lennon album in the budget because we were not sure we were going to get one.

Q Are you ever sure?

A Ever is a long time. Sometimes we are reasonably sure, but generally with artists today you are not really positive of anything, of most things.

Q So I take it you did not make a projection for Shaved Fish?

A We didn't have it in the budget.

Q Did you know when it was decided to release Shaved Fish?

A I don't know the exact timing.

Q Have you ever had a budget projection in the last five or six years other than this latest one where you left Lennon out?

A I went over those with you first thing this morning.

Q Did you have a Lennon projection for each one?

A That is right.

Q But for this one you left it out? Let's talk about Canada, if you want to talk about that.

Now, first of all, did you also cut the price of the album in Canada and overseas?

A Well, Canada, yes, and I guess overseas, too.

Q Why? You were not meeting any competition from Roots in Canada or overseas?

A No, and we didn't claim any loss. It is just when we release an album in the states, there is a SK prefix right on the album. SK goes into the computer, it is a price, and that price happens to be based on that particular list price.

Q Is it your testimony that Capitol always charges the same list price in the United States, Canada and overseas?

A First of all, the Canada list price is a little

different. Our list price happens to be $6.29 in Canada. Canada happens to be a little higher priced, although the tape is the same. What we are selling here is finished goods, like the PXs,where they ship it overseas, and, yes, we have the same suggested list price.

Q They are always uniform?

A I don't want to use always.

THE COURT: As far as the price in Canada, you say the suggested list price is a little higher?

THE WITNESS: It is $6.29 on $5.98 and $7.29 on $6.98.

THE COURT: What about for the tape?

THE WITNESS: I am almost sure. I have got the price list here and I can tellyou. I am almost sure it is the same price. The tape is the identical price as in the United States.

Q How much are the wholesale prices in Canada?

A On the $6.29 disc the deal price is $3.51, and the sub-distributor price is $3.16. On the tape, dealer price is $4.10: sub-distributor price, $3.69.

Q Are those the prices to which you cut them? In other words, what is the higher wholesale price and what is the lowr wholesale price? You say you cut the price in half?

A I don't know what you are talking about.

Q Let me start again. You claim that you cut the suggested retail price in the United States from $6.98 to $5.98: you cut the wholesale price in the United States, did you not?

A Sure.

Q Let us talk about only disc.

A Okay.

Q My question to you is, did you also cut the wholesale price in Canada?

A Yes, sir.

Q What would the wholesale price in Canada have been before you cut it and what was it after you cut it?

A At $7.29 it would have been $3.69 on the disc, and after you cut it it was $3.16.

pm

Q What was the $3.51 you gave me before?

A That is the -- when we sell directly to the dealer without going through the subdistributor.

THE COURT: Wait a minute now. On a 1972 list price album Capitol would be selling to its customer at $3.66?

THE WITNESS: Its subdistributor customers, right, sir.

THE COURT: Well, that means the rack jobbers, right, so-called, is that right?

You are nodding.

THE WITNESS: Yes, sir.

THE COURT: Does it mean a big store like Korvette's if there is such a thing in Canada?

THE WITNESS: I don't know what they do in Canada when they have very big chains.

THE COURT: OK.

And this album was listed at $6.29 in Canada, is that right?

THE WITNESS: Yes, sir.

THE COURT: And youare saying that the price was $3.16?

THE WITNESS: Yes, sir.

THE COURT: OK.

Q What is the range of discounted retail prices in Canada?

A I am not qualified as an expert on that.

Q You don't know what the records sell for?

A I just made a trip to Canada and all I can say is what I saw in the couple of stores I visited, that they have a wide range. They discount sometimes heavily on the new releases and they also have quite a bit of their new releases and catalog at prices that look similar to the States.

Q What I am trying to find out is, are the retail selling prices the actual retail selling prices in Canada in roughly the same range as in the United States or do they vary?

A I don't know for a fact. I would suspect that--

Q You don't know. Don't even suspect.

A OK.

Q Now, do you know if the same type of advertising is used in Canada as in the United States?

A Again, I cannot state with facts.

Q All right.

Do you know if television promotion is the same in Canada as in the States?

A The reason I am having difficulty in answering

these questions, their market-- they might, given an album with an act like we will say Status Quo, which has been successful in Canada, they may do a little bit more or a little bit less but they would advertise, they would use our type of work that we have done, they would use the posters here in the states, the buttons, the radio spots. We would prepare, to the best of my knowledge, everything that they would use, and generally, on a major act, they just follow our lead or not our lead -- it is a coordinated marketing plan and they would execute it in the same type of fashion.

I can't say that for a fact on every single album, but I believe that's reasonably true.

Q Do you know whether the tastes of Canadians are the same as the tastes of Americans?

MR. GRANETT: I object.

MR. SCHURTMAN: Why?

THE COURT: This isn't any problem. No, I will overrule the objection. If he knows, he knows. If he doesn't know, he can say so.

A We have experience that-- if you look at the Canadian sales, you look at the United States sales on various artists, there seems to be a pattern developed and basically artists that are successful in the States are

often usually successful in Canada. There is a relative relationship. But especially if you take the same artist and you compare his relationship over time, you could easily tell how Canada is reacting to the United States.

Q Let's take the same artist. Let's take John Lennon, and look at your Exhibit DF, which compares U. S. sales and Canadian sales on certain Lennon albums.

And if I look at your percentages, it would seem that the Canadians liked Some Time in New York City relatively better than they liked Imagine which was a huge hit in the United States.

A Thatis what the numbers show, sir.

Q That is what the numbers show. And they liked Mind Games relatively better than they liked Imagine.

A And that is true.

You might notice in Some Time in New York, it sold very few copies, nevertheless,than Imagine, even though the share was lower, but you are right in what you said.

Q Right. And they also liked Rock and Roll relatively better than the people in the United States?

A Well, I think Rock and Roll sort of stands out like a beacon there.

Q You may think that the difference between 13.6

and 19 is a beacon. All I am suggesting to you is that perhaps Canadian tastes are not the same as Americans' tastes.

Have you taken that into account--

A Well --

Q --in preparing your projections?

A That is what this does, Mr. Schurtman.

Q Well, let's look at another exhibit, DI.

A I was going to tell you before the break on DF that if you took the three albums that you asked us to get the information on, that the share on those three albums which were the earliest albums, was 5% on the Unfinished Music, 5.8% on the Wedding album, and 4.6% in Toronto. So combined, the three of them had an average percent 4.7 which was on the low side and brought the total average for all eight albums in the range of 8.8%.

Q Are you telling me that--

THE COURT: What was the 5%, the Unfinished Music or Wedding?

THE WITNESS: Unfinished Music.

Q Are you telling me that the concert which Mr. Lennon recorded live in Torono, Canda, attracted very little interest among Canadians?

A I am simply saying that that is what it sold there.

Q All right.

Look at Exhibit DI. I just want to ask you a couple of questions about it.

A Yes, sir.

Q Now DI are the December 1974 to April 1975 new releases without Lennon. And again I am just trying to get an understanding of what Canadian tastes are like.

Now, who is Babe Ruth, for example? I assume it is not the baseball player?

A That is an artist that was particularly successful, particularly successful as I was told in Toronto. They broke out a discotechque single in Toronto and it toured very heavily in Canada in the Toronto area and it just did exceptionally well.

Q And the Canadians went wild over Babe Ruth even though Americans did not seem to be that excited about it?

A That's true.

Q Who is Bob Seeger, who is the Status Quo group?

A That is a group that just happened to do very, very well in Western Canada, I have been told, and it sold, as you see. That is why, Mr. Schurtman, if you take all this, it was to demonstrate for you that if you take a big-enough sample, you are certainly going to find some exceptions both ways.

I didn't want, I thought it might be helpful to the Court if we had a sample, not only of John Lennon's history to get his share on all prior albums, but I might tell you, Mr. Schurtman, one point that maybe should be made in all of this -- there is no perfect method.

If we had a perfect method that would say this is what would have been if we had-- if this had not happened, it would be fine. These are just trying to give the Court something to hang his hat on if -

Q I suggest to you that in using the Canadian statistics, sir, you have not taken into account the differences of taste between Canadians and Americans. You have given us no evidence of whether the --

THE COURT: Don't argue with him. We have a job to do and you keep asking him questions.

MR. SCHURTMAN: I will do it in the form of a question.

THE COURT: All right.

Q Do you know what the state of the Canadian economy was compared to the American economy in 1974 and 1975 and other dates you have on here? Are you in a position to give us a point-by-point comparison?

A No, I cannot.

Q Incidentally, on DI, I see the second listing is

on John Harrison.

Is that another former Beatle?

A Yes, it is.

Q And does that indicate that his latest album sold 400,000 in the United States?

A Yes, it does.

Q How would you compare Mr. Harrison to Mr. Lennon? Do you think he is more outstanding or less outstanding or don't you have a view?

A I think the best way of comparing it is just sales history of the two artists, and that's available to the Court.

Generally the people at Capitol feel that Mr. Lennon has a lot of creative ability, a lot of potential, has a big upside potential, both as a writer and a performer and it just wouldn't surprise anybody if his next album was another Imagine.

Q Now with respect to Canada--I started to ask you about the types of TV coverage, but specifically with respect to Rock and Roll, we have heard testimony from Mr. Zimmermann that TV coverage in the United States was allegedly curtailed because he didn't want to compete with the Roots TV coverage.

Now you didn't have that problem in Canada. Did

you curtail TV coverage in Canada as well, or don't you know?

A Since to the best of my knowledge, since we did not go into a massive TV campaign here in the States as was hoped to be done-- since the United States didn't go into a large TV campaign,Canada just didn't either.

Q Why?

A I think we generally work in concert. If you spend a lot of money on an album, TV is the most expensive type of promotion you can do. The people in Canada to some-- the dealers and the accounts do get Billboard and they do get -- they get the trade papers up there and if an album is doing very well here, it encourages them that maybe there is a bigger market and they might possibly buy more up there.

So as a general principle, you can make anything you want of it, I would say generally it is far better to do it together and to get the synergistic effect than to do it alone.

Q You just said that the dealers in Canada get Billboard and that tells them how well an album is doing?

A How relatively well.

Q What in Billboard tells them that?

A Comparatively how high the album might go, how

long it might stay on the charts,what sustaining power it has.

Q You mean they look at the charts to see whether an album is doing well or badly?

A Everybody-- I won't say everybody. The charts are samples, they are certainly not perfect. I am sure there are many mistakes that have been made over time but on balance one would hope that they would give me a relative feel, not sales numbers, because it just depends on what the competition is at that time with the album but a relative feel of what it is doing in the marketplace compared to others.

They tend to err often on the major act if they are going to err because where a major act comes out, they just kind of, I think, feel that there is a lot put out in the marketplace and they put it a little higher because of the history of the artist, whereas a new act has a harder time sort of proving itself and then if it does sustain its--

Q But people in the industry do use the charts as a gauge of whether an album is doing well or badly?

A That's true, relatively well and badly.

Q And in your experience, as long as we are on that point, if an album manages to get to the top 20, within

three weeks after it has been released, is that an indication that the album is doing well?

A Mr. Schurtman, well is really a relative word. There have been albums that have got, maybe the 20th position, that do far poorer than another album that gets to the 20 position or the 25th, actual saleswise.

Q Mr. Posner, do you know of many Capitol albums in the last few years that have gotten to the top 20 within two or three weeks?

A I can't rattle them off to you, no, but we do have them, and generally a major artist will rise pretty quickly on the chart until it is found out quite how it is going to do.

Q You told us yesterday that it was your original intention to testify about the Canadian experience, that you had prepared notes on that, but then during the recess, you decided to refine your notes.

Do you have your original notes with you?

A No, I do not.

Q What did you do with them?

A They are either in the file back in the office or I threw them away when I had these typed. But if you wanted to collaborate that testimony, we spoke about it in the taxicab coming and going from the court with Mr. Menon,

Mr. Zimmermann, Mr. Prettyman and myself. We talked about it that evening and it is a fact, Mr. Schurtman.

Q Were your notes different from the figures you have given us now?

A What I didn't have then -- my idea was to find a market that would give us some sort of a handle and Canada was the medium to come up with because the album wouldn't even be shipped into Canada generally, the Boots album. Then I thought of comparing Lennon's sales history, which we did, and I had those numbers with me.

What I didn't have with me at that moment of time was the second-type approach which is on DI where I got the albums that were released at the same time before and after, and I thought that might be a reasonable thing for the Court to see, too,and maybe Lennon compared against Lennon wouldn't be the only way of looking at this, and that is why you have DI.

Q Let's leave Canada and move on to something else.

Your alleged loss of profits. Would you look at Exhibit DL? Now you start off with the computation of $150,000 and that seems to include not only U. S. sales but also Canadian sales and foreign sales.

Now, are you claiming damages for Canada and the foreign sales as well as the U. S.? I am still not

clear on that.

A Well, let me clear you on that, if I may, sir.

Q Would you?

A On what we truly sold -- we know we sold to date these units that you see there. All of that first part says had we been able-- had we sold it at $6.98 both in the United States and that would have been $7.29 in Canada and $6.98 to the PX and Armed Services, we would have realized approximately another 24 cents.

But when we go to the balance number 2 and number 3 and number 4, I did not want to muddy the water, even attempt to say that we suffered loss in the PX's or over-seas shipments or in Canada, and just left it out because those are projected sales of what might have been and I felt it was more conservative to say what might have been if we didn't lose anything anywhere else.

Q Was any consideration given to not cutting the price in Canada and overseas?

A I don't know about any consideration but it is just sort of a rule of the game when an album is priced here in the States you get a prefix of an estimate, just an SK worldwide for Capitol-distributed products.

Q All right. Now in Item 2 on Exhibit DL, I assume your projection of 645,000 projected U. S. units is based

on all these different averages that you have been giving us?

A The ten methods that were submitted, that is the simple average.

Q That includes the Canadian averages and the 750,000 projection without returns and all these other averages, right?

A Well, you put it-- yes, it does.

Q OK.

Now, when you look at the damages you claim in item 1, and you look at the damages in item 2, are you doubling up to a certain extent?

A Of course not.

Q You are not doubling up at all?

A Not doubling up at all. You can see for yourself. And the only additional units I did multiply 645,000 units but just the additional 303,000 units times the profit before overhead.

Q But on that one,you claim a profit of $1.47?

A Yes, because on $6.98 that is what estimate it would have been.

Q Turn to item 3. Now in that one you claim that you lost 150,000 sales on Shaved Fish. Are you simply basing that on what Mr. Zimmermann told us or do you have

any independent evidence to support your claim that you lost those sales?

A Well, first, the number used of 150,000 is based on Mr. Zimmermann's estimate. That is true. Basing loss on future sales is much more difficult at best -- and basing on Rock and Roll -- but the one, the one thing that I did feel myself, in my experience rather strongly about is that once you-- that if you remember what has happened to Mr. Lennon, he came out of Imagine and went to Some Time in New York, which really kind of hurt him, and he sold very poorly. There were a lot of things happening at the time with Mr. Lennon. It was a difficult time.

He started to rebuild with Mind Games and Walls and Bridges.

Had Rock and Roll come out, especially had it received the promotion, the TV promotion that was as Mr. Zimmermann stated was to be, we would have had quite a bit of momentum going and there was quite a chance whatever Shaved Fish sold, it wouldhave been hurt to some extent because you don't quite regain that, you are at a lower base, you are at a lower base going upward

And it just seemed, in my opinion -- I don't know whether 150 is a good or bad number - it kind of seems to me in my judgment,my experience, as a reasonable number.

Q So I take it you base the 150,000 simply on the alleged loss of momentum?

THE COURT: You answer the question. Then give me just a moment.

What is your answer?

A Primarily, sir.

Q What else do you base it on?

THE COURT: Excuse me, Mr. Schurtman.

Q Well, you said you base it primarily on the alleged loss of momentum.

What else do you base that figure on?

A I think you struck home on that. That's really -

Q You withdraw the word primarily; that is all you base it on?

A I think so.

Q OK.

Now, the next item, item 4, you talk about the projected impact on two probably future repackages. And you come up with a projection that they will sell 200,000 fewer units than they would have sold otherwise.

Is that still due to the loss of momentum?

A Yes. Please understand that 200,00 units is for two of them combined. Individually, one was in our minds at 120,000 units and the next one 80,with the loss

getting less each time.

Q I see.

So, in other words, your claim is that the adverse impact of Rock and Roll to the extent that it had poor sales carries over to I guess the third generation?

A Yes, that's it.

Q All right, then take a look at your Exhibit DD again.

Now you have told us several times that Some Time in New York City was a terrible album. It bombed.

Would you say that the adverse impact of Some Time in New York City carried over to the third generation which happened to be Rock and Roll?

A It couldhae some effect on that, yes, but you understand -- you understand surely, Mr. Schurtman, that had Some Time in New York been a very successful album, and based on this premise, then Mind Games hopefully would have sold more and so would Walls and Bridges because Mr. Lennon would have had this momentum and therefore Rock and Roll would have. But it still could have easily been hurt; you would have just a higher top and still the same hurt. Do you understand?

Q No.

A You don't. I am sorry about that.

Q As long as it is on the record.

A Would you like me to try to say that again more slowly?

THE COURT: OK.

A Had the momentum been going, Rock and Roll -- skipping all the way to Rock and Roll, Rock and Roll probably would have sold more units both here and even in Canada, if you will, because there is a relationship. And, therefore, when the Roots album problem came up, this whole problem that we are talking about for days, it would have -- the projection on Rock and Roll might have been higher to begin with and would just have dropped from, say, let's pick a number, I am just picking one-- 850,000 to whatever it came into instead of it being 342, actually it might have been 442.

THE COURT: I am not clear on momentum. Can you just translate that into terms of the actual market? Sales are made by people coming into record stores and buying albums. That is what we call consumer sales and then the customer sales are the rack jobbers or the stores buying from Capitol, right?

THE WITNESS: Right.

THE COURT: And of course there are people who buy from the rack jobbers, so it is people buying.

Now what is momentum? How do you translate momentum into that situation?

THE WITNESS: I think the best way was if I recall what Don Zimmermann really said.

THE COURT: All you can to is --

THE WITNESS: All I can do is reconfirm it. What happens on a prior album influences the customers of Capitol as to what they will do on the next album, and generally the more exited they are about the album, the more they will do. They will display it better in the store, they will think they have more of a winner.

If the prior sales were disappointing, they do less to help that album along and will go with others that were winners.

Well --

THE COURT: How about the consuming public? Now that we have a difference-- the fellow in the store runs a store, he is worried about how well lthe album will sell, obviously. He keeps in mind the record of the past sales and so forth. Now the teenager really doesn't have any commercial considerations. What is the consideration for the teenager?

THE WITNESS: Well, obviously, what you are driving at is that really what is the major determinant

of an album, what is it, how good is it.

But there is another factor that we should stress, I think. That air play in this country is pretty hard to come by. Not every album really gets on. It is hard.

THE COURT: What is air play?

THE WITNESS: Being exposed on the radio stations so that the people, especially children, hear it.

THE COURT: Disc jockeys?

THE WITNESS: Yes, sir.

THE COURT: OK.

THE WITNESS: OK. So if you have had a bad alum or an unsuccessful album, it is more difficult for our promotion people to encourage the radio stations to pick up the next album or single from the next album. It is hard to break in with new acts, and it is hard to break in with--it is easier, obviously, to break in and get a fair amount of air play if the prior album was successful.

THE COURT: OK.

Does Capitol have any statistics about air play for Rock and Roll?

THE WITNESS: I can't tell for a fact whether our promotion department knows what is played everywhere in the country. Certainly the minute an album comes out, each promotion manager is talking to the field people, trying to

convey how to get the album put on the radio. But I really can't say relatively one album more or less, if that is what you are driving at.

THE COURT: OK.

Q Mr. Posner, you said a few moments ago that ultimately the main criterion is what is in the album itself, what it is all about. Now I think you were here this morning when some records were being played and there was a great deal of discussion about what is considered a genuine Lennon album and what is not.

Now look at your Exhibit DD again. And let's start with Some Time in New York City which I believe defendants claim isn't really quite a genuine Lennon album.

Without conceding that point, but assume that as a premise, so now the next two albums everyone concedes are genuine Lennon albums --

THE COURT: I don't think genuine is quite it. Characteristic.

Q Characteristic Lennon albums. OK? Mind Games and Walls and Bridges. These are songs composed by Mr. Lennon, performed by Mr. Lennon. They are the Lennon style.

Now suddenly along comes the next album, Rock and Roll, which as we all know is not Lennon's songs, it is not compositions by Lennon. He simply recorded some old

1950 rock and roll songs.

Now would that make an impact on the teenagers who want to buy characteristic John Lennon songs, in your view?

A In my view that album should have sold better than it was and, secondly, I know you are asking difficult questions-- you talked bout the era at that time, the nostalgic era; things don't become black and white -- you drop off overnight -- things stay for a while. This was a good time, maybe not the best, certainly not the worst, to put out an album of that sort and to merchandise it effectively. It should have been-- I don't want to use the word "very" -- it should have been a successful album.

Q But now could you focus on my question which was a very specific one? This was not an album of John Lennon composed songs, it was not a characteristic John Lennon album in that sense.

In your view, did that have an adverse impact on the tastes of the consumers, on people who might want to buy something like Mind Games, or Walls and Bridges or Shaved Fish, because these were Lennon compositions, might not be interested in hearing Lennon sing some old rock and roll songs? Do you have an opinion on that, sir?

A I don't have a good opinion on that subject.

Q All right.

Can you at least tell us whether that may have affected the amount of air play that was given to the album on radio? That disc jockeys who might be eager to play a new John Lennon composition did not want to play his old rock and roll songs; do you have an opinion on that, or any information?

A My opinion would be strictly an opinion. I think no.

Q And you have no information on that either?

A No, I don't.

Q All right.

Now, going back to Exhibit DE. Are you in a position to furnish me with the projections and the actual sales during the first 90 days of the 30 artists who appear in that exhibit? Do you have it with you?

A No, I do not.

MR. SCHURTMAN: Your Honor, I wonder if you would direct that this information be furnished.

THE COURT: Let's hear the question.

(Question read)

MR. GRANETT: May it please the Court, I object to this as --

THE COURT: Sustained.

MR. SCHURTMAN: In that case, your Honor, I renew my motion to strike Exhibit DE on the grounds that it is a single projection plucked out of thin air.

THE COURT: He has given us, I believe, the projections for the other Lennon albums, so it is not a single projection plucked out of thin air or whatever else you were going to say.

MR. SCHURTMAN: It is a single projection of the ones made in February of 1975. We don't even know who the projector was in those days. We had different economic circumstances.

THE COURT: I am just going to relieve your pain on that. I attach very little weight to the 750,000 projection.

MR. SCHURTMAN: OK.

THE COURT: As givine me any guide as to the sales, as to potential sales, and there are other figures we have and I think I can use them much better.

Q Now let me get to the profit question. According to Exhibit DL, you claim that your per unit profit is $1.47, on a wholesale price of I assume $3.32, is that correct?

A Well, the first part of the sentence is. The last is almost entirely correct.

Q Well, when you wholesale an album for $3.32 --

those are the gross revenues received by Capitol, right?

A Right. The only thing I wanted to say is that there was a price increase at one point to $3.36.

Q I know but skip the four cent price increase.

A Right.

Q So we can focus on something, OK? So your gross revenues on an album were $3.36 and you claim a profit of $1.47 which according to my calculation is a profit of 44% on sales?

A Well, if you are going to do it that way, let's straighten you out, if we can, sir.

Q Sure.

A The $3.36 is really $3.54 because in the sales there are also tape sales, and the tape sales, as you might recall yesterday, are higher. I can walk you through that if you like.

pm

THE COURT: In other words, the $1.47 figure is based on the 3.54?

THE WITNESS: Yes, sir.

THE COURT: Well, let us take that.

MR. SCHURTMAN: All right.

Q Now, Mr. Posner, you gave me a blue sheet last night which you said might show me if I understood it the expenses that are deducted from the gross income in order to arrive at your net profit. I could not quite follow some of the figures. So what I have done, I have listed what I think are common items of expense, and I wondered just by using your blue sheet, and it shouldn't take more than three or four minutes, you could fill in the figures or tell me where the items don't make sense.

MR. SCHURTMAN: Why don't you mark this as the next plaintiffs' exhibit.

(Plaintiffs' Exhibit 240 was marked for identification.)

MR. GRANETT: May it please the Court, this is the very thing that we anticipated would happen. I challenged the good faith of such a request. This is highly confidential information.

THE COURT: No, I am not going to hear about it. There are figures included in these calculations

of damages about Capitol's net profit, and that has to be explored, and everything that is relevant or of possible issue about how that net profit is arrived at is going to come out. The only thing I am worried about, I don't want to have a lengthy exposition of things that there is no legitimate issue about.

MR. GRANETT: We do have a bottom line figure.

THE COURT: That is a bottom line figure. How do you get to that? He is entitled to explore it. Maybe this is a quick way to do it.

Can you fill all these things in?

THE WITNESS: May I say something? Anticipating you would have a problem -- and I don't want to calculate the problem -- I have actually done just that, and I have a document here that takes it right down, and we won't have to shift terminology.

MR. SCHURTMAN: May I see it?

THE COURT:Mark this 241 for identification.

(Plaintiffs' Exhibit 241 was marked for identification.)

MR. SCHURTMAN: Do you have an extra copy for the Court?

THE COURT: You use it, Mr. Schurtman.

THE WITNESS: I didn't get a chance to make one.

Q First of all, you have an item in there that says Standard Manufacturing Cost.

A Yes, sir.

Q What does that refer to?

A That is the cost of manufacturing the disc and tape.

Q Is that what is always referred to in the industry as pressing cost?

A It is the cost of pressing the album.

THE COURT: I was interrupted. What are you giving us now?

MR. SCHURTMAN: Plaintiffs' Exhibit 241 for identification is Mr. Posner's own recap --

THE COURT: I thought we marked your form 241.

MR. SCHURTMAN: My form was 240.

THE CLERK: Mr. Posner's form is 241.

THE COURT: Go ahead, Mr. Schurtman.

Q 241 shows standardmanufacturing cost of 40 cents an album?

THE COURT: Is that for a $6.98 album or a $5.98 album? Or is it different?

THE WITNESS: It is the same album.

Q And that is for pressing cost, and that

expression has come up before?

THE COURT: And that is how much?

MR. SCHURTMAN: 40 cents.

Q Now, I don't see anywhere on this statement that you prepared any reference to recording costs, and earlier at this hearing somebody offered an exhibit which showed that the recording costs which included getting the tapes back from Spector and paying him and so forth, paying the studio musicians, came to $204,000, if my memory serves me correctly.

Now, where is the $204,000 in your recap sheet?

A It is not there.

Q Didn't somebody pay it?

A Yes.

Q Who paid it?

A EMI, the owners of the master.

That is why we paid them a pressing fee on each unit sold, and so does every other country pay a pressing fee on every unit they sell.

Q Do the recording costs exceed the total amount of the pressing fee?

MR. GRANETT: I object to that. How would he know?

MR. SCHURTMAN: Very simple. You multiply

the pressing fee --

Q The pressing fee, according to your recap is 15 cents?

A At $6.98.

Q Let us multiply 342,000 times 15 cents.

A Right, and that turns out on my sheet to be $51,700.

Q $51,700? So you have paid the pressing fee of $51,700 to EMI?

A That is correct.

THE COURT: Have you got these figures both in cost per unit and in total cost?

THE WITNESS: I do here, yes, sir.

THE COURT: It is a little hard for me to follow, since you got the sheets. Just as long as you go through it in an orderly manner.

You started up with what you call pressing costs 40 cents per unit?

THE WITNESS: The first thing we took off is pressing costs.

THE COURT: Do you have that figure, a total dollar figure for this record?

THE WITNESS: Sure.

THE COURT: What is that?

THE WITNESS: It is $136,900.

THE COURT: Is that the kind of thing as you press more?

THE WITNESS: This is based on every unit sold, this first number that you have here. For every unit sold we take what we call our manufacturing cost, which happens to be so much on a disc, so much on a tape, and that is what it is, $136,900.

There is also a cost down below.

Q Did you just multiply 40 cents by 342,000?

A Yes, sir.

THE COURT: Let me see. You have the pressing fees to EMI. What are those figures?

THE WITNESS: It turns out to be $51,700, which is divided by the units. That is actually the way we do it, get the cost, divide it by the units, and it came out to be 15 cents. It could be .151. I rounded it.

THE COURT: Where do you start? Your standard manufacturing? Do you start with a total dollar figure and then divide by 342, or do you go the other way?

THE WITNESS: Let me explain just that. The way we would do it, we would say how many disc units did we sell. The standard manufacturing cost on a disc starting with this fiscal year, for the sales in this year,

was 42.90; last year it was 39.2 -- inflation. And so we multiplied the 218 times the standard cost. On the tape, we take the tape sales, cartridges, cassettes, each cost difference, multiply the units sold times the cost per unit. We call it the standard manufacturing cost and come out with a total manufacturing cost. That happened to be with this mix $136,900.

THE COURT:And the mixed figure is 40 cents?

THE WITNESS: That is right, if you divide that dollars by the units you get 40 cents.

MR. SCHURTMAN: I started to ask the witness about the recording costs, studio, musicians, et cetera, and Mr. Prettyman introduced evidence a couple of days ago that the total recording costs came to $204,000. Now the witness has just told me that of those recording costs he has deducted only $51,700, which represents the so-called pressing fee that Capitol pays to EMI. I gather the pressing fee is really a form of royalty.

THE WITNESS: That is correct.

THE COURT: I don't understand. Are you saying that the $204,000 or whatever it was was paid by EMI?

THE WITNESS: Yes, sir. That is a different type of cost: that is the recording cost.

THE COURT: He said so far that has been

reimbursed, so to speak, through the pressing fee to the extent of $51,700.

THE WITNESS: That is correct. Please understand, though, these units were also sold. What you got here is just the United States. Now, Canada, New Zealand, Australia, wherever it is sold, EMI owning the master, licenses people all over the world, and in our business it happens all the time. Sometimes it costs you $200,000 to record an album and you never recoup it, because it didn't sell enough.

And sometimes you do much more than recoup.

MR. SCHURTMAN: The problem I have, your Honor, so you will understand what I am driving at, here was a situation in which you spread the entire recording cost over the albums that were sold. I don't think you come up with much of a profit figure of anything, and I think I will have to explore the question of whether under Capitol's normal accounting methods the entire recording cost would be charged to the album. In other words, if Roots had never been on the scene at all, if they had simply gone ahead with their original plan to produce the Phil Spector Rock and Roll album and they had spent $204,000 on recording costs and they had sold X number of units, and let us assume it is 300 or 400 or 500,000 units, it seems

to me the entire recording cost would have to be deducted before you reached a profit figure.

THE COURT: What I think the witness is saying is that the recording costs are the costs of EMI as an initial position. Then the different subsidiaries or licensees in the United States, in Australia, in India and so forth pay EMI a fee.

Obviously, as of now the United States sales have produced a fee to EMI of only about a quarter of the recording costs.

MR. SCHURTMAN: If they had sold twice as much --

THE COURT: Just a minute. There is nothing in the record to indicate what the New Zealand or the Australian sales have done. But my basic problem is, it is kind of an accounting problem. Capitol does not record the recording costs as costs of Capitol, and since Capitol does not have to bear the entire recording costs, then it seems to me a legitimate thing.

Now, are we going to somehow lump Capitol and EMI together in figuring profit and damages?

MR. SCHURTMAN: Your Honor, that is what they have done. Mr. Prettyman told you at one point that he was lumping EMI and Capitol together, and I will look it up in the record.

THE COURT: For this purpose?

MR. SCHURTMAN: For purposes of claiming damages. Now, one of the classic situations -- it comes up all the time in antitrust cases and so on, in corporate enterprises, when a corporation wants to show a profit -- and I am not saying they do it improperly -- certain costs are shunted to a particular corporation.

THE COURT: I don't know all about it, but I know about corporate accounting a little bit.

Now, the question is this: It seems to me as an initial proposition, we have got several defendants making counterclaims and I start with the idea that they have their distinct claims. They may have similar claims on the same theories. But I start with the idea that I am considering right now Capitol's claim for damages, and that is different from any claim of EMI. Maybe I am wrong. If we lump it all together, then it seems to me we will have to take the entire world-wide sales as a way of figuring profit. I don't know.

What about that, Mr. Granett? I don't mean to put you on the spot.

MR. GRANETT: I have not had a chance to clarify that in my mind, and I may take a position something counter to Mr. Prettyman.

MR. BERGEN: Exhibit DL does refer to damages to Capitol, your Honor, and I just want to add that Mr. Lennon has testified that if he makes an album in the United States, Capitol pays the recording costs, but then they are reimbursed by EMI. That is just the way it works. If hemakes the album in England, as he has done in the past, then EMI pays the recording costs.

But that is in the Capitol-EMI-Apple agreements.

THE COURT: I will take a stab at my memory. I thought that the basic theory presented by Mr. Prettyman, and I think this was sort of joined in by Mr. Grumbach, you have three corporations, Apple, Capitol and EMI, and that the claim of lost sales is the claim of Capitol, and that Apple's claim is simply what it would get.

It is not that we really got three different people, three different companies directly claiming against the plaintiff. It is really basically a claim of lost sales and profits, and it is up to them to pay each other, depending on their contractual arrangements.

Isn't that basically right?

MR. BERGEN: Yes, except Apple's claim is Mr. Lennon's claim, and I will have just a half dozen questions to ask Mr. Posner to bring out what Mr. Lennon's loss in terms of royalties would be, and, really, when I say

only a half dozen questions, I mean a half dozen questions.

THE COURT: Let us finish up with Mr. Posner.

MR. SCHURTMAN: Let me say this: I hoped to shortcut it by getting basic figures, but I think we are running into accounting difficulties as to how these transfer costs are handled.

THE COURT: I don't think we are getting into any difficulty. I don't know what the legal result will be, but I have no difficulty whatever with any concept he has prepared from an accounting standpoint.

MR. SCHURTMAN: Fine. Then let me simply ask him, let us see if we can fill in these figures based on his sheet.

THE COURT: All right.

Q Recording costs, you told me Capitol does not pay because you pay the pressing fee.

A Let us be specific. Our cost on this album was $6,300; there was some studio costs; after all the recording has been done, to put it in its final form, that is one of six costs I have dealt with in our projection.

Q Which item is that?

A The recording costs.

Q Will you point it out in Plaintiffs' Exhibit 241?

A I simply put the word"fixed," because I was showing on this one, Mr. Schurtman, the unit profit before fixed costs and overhead, because our fixed costs amounted in the neighborhood of somewhere between and 50 and 60,000, which we built in our profitability, we recouped it, and what I am giving you here is for every additional unit sold we would make so much.

Q You didn't include for any? You show zero?

A No, I just drew a dash here. I didn't put in the fixed costs. If you want me to put them in, I will be delighted to.

Q Would you?

A The recording fixed cost to Capitol Records is $6,300.

Q Now, what is the packaging cost, the jacket cost?

A Package costs that we have in here are $4,200.

Q $4,200?

A That is a fixed cost. Again, Mr. Schurtman, a fixed cost is one that you incur where you sell one unit or one million units. The cost is in the album.

Q Isn't that the cost of printing the jackets?

A No, that is not. The cost of printing the jackets is in the standard manufacturing cost, where you have

a disc in a jacket, and for every unit sold you must spend so much money for that jacket.

Q When you told us that pressing costs were 40 cents, that includes jacket cost?

A Yes, it does. I might assure you, Mr. Schurtman, that these numbers are supported by complete documentation.

Q Do you use yourown pressing plants?

A Yes.

Q That is wholly owned by Capitol?

A Yes, we do.

Q And they bill you for the pressing and jacket cost?

A I don't know what you mean by "bill you." There is a cost that we incur in our plant, and it is called -- I really want to get a little more explanation -- manufacturing costs are broken into two lines. One is called the standard manufacturing costs, which is a general concept for every unit sold you put in standard cost, but at the end of the year you find out that sometimes the total cost of what you have done in the plants are a little more or a little bit less than what you estimated to be the standard for the year, and that is called manufacturing variances. They deviate slightly.

MR. SCHURTMAN: Your Honor, I realize we are close to 4:15 and I think we are getting into the very

thing I had hoped to avoid, great detail.

But may I respectfully suggest that perhaps the way to handle this one is either by deposition or interrogatories, because I have to get into the profit factors. I think by the time I get finished I will be able to show there would be no profit regardless.

MR. GRANETT: This is the second trip by Mr. Posner.

THE COURT: I can't help that. Capitol is suing for hundreds of thousands of dollars. If they pay a couple of plane fares across the country, that is just too bad.

But I think what I would suggest is going along. I think what you are trying to do is this: You are trying to get some information and you are trying to see what you want to controvert and what you don't. Maybe you can do that by working with Mr. Granett and Mr. Prettyman. I want to have it done in the easiest manner formally that we can. I don't want to get just a matter of sloppy oral discussions outside. You have a right to have a record. But it does seem to me that you can perhaps in letter form draft up a statement of information you want. I really don't see any reason to hold Mr. Posner here, because I think that is information that you have a right to get, I mean the kind

of thing you are asking you have a right to get, and if it is a matter of him looking at sheets or the books of Capitol or whatever and providing it, he will.

Then after you get what you want you present these as pieces of evidence or whatever.

MR. SCHURTMAN: On the question of confidentiality, I have a problem in the sense that I would like to consult an accountant who helped me in formulating the right questions. I am not an accountant. I have no knowledge of accounting.

THE COURT: Whom would you want to consult?

MR. SCHURTMAN: An accountant who is experienced in the industry and who would sign a stipulation that whatever information he gets is confidential.

THE COURT: That is no problem. It is not an employee of some competing company; it is an independent accountant?

MR. SCHURTMAN: Absolutely.

MR. GRANETT: I would like to say this, if the Court please: I have no way of knowing how far this inquisition is going to go. Based on past experience, I am a little bit apprehensive, based on a subpoena that was served, a copy handed to me in the courtroom today.

THE COURT:Mr. Schurtman can write a letter

mmbr 17 Posner-cross

saying what he wants. He has gotten a lot of information in this sheet, Exhibit 241, but we have not got a lot of time to explore it, and it probably would not be worthwhile to hold Mr. Posner here. So he can look that over. He can see where he thinks the gaps are, if any. He can talk to his accountant. He can get advice and he can come back with his requests for additional information.

Now, if Capitol has objections to that, they can tell me. It is just as simple as that.

MR. GRANETT: Objection, you mean, to the procedure? Or to any inquiry that there may be?

THE COURT: To any piece of information he wants, and if you feel that it is getting too detailed or irrelevant or oppressive or whatever, just tell me.

MR. GRANETT: That right is reserved?

THE COURT: Of course it is.

Can we let Mr. Posner go?

MR. BERGEN: I would like to ask him just a few questions.

MR. GRANETT: I think the requests will supersede the subpoena that was served today?

MR SCHURTMAN: The subpoena is for different reasons.

THE COURT: We are going to be together

tomorrow. These procedural matters we will take up tomorrow.

Now, wishes to ask Mr. Posner some questions?

MR.BERGEN: I do, your Honor.

BY MR. BERGEN:

Q Can you tell the Court what Mr. Lennon's royalty is on a $6.98 disc?

A On a disc it is .6866 cents.

Q And how about on a $7.98 tape?

A .648.

Q And on a $5.98 disc, what is Mr. Lennon's royalty?

A 58 cents.

THE COURT: And on a $6.98 tape?

THE WITNESS: 54 cents.

Q Now, with those figures, isn't it true that Mr. Lennon's royalty would be less if the album was sold on a $5.98 disc and the difference would be 10 cents. Look at Defendants' Exhibit DL, the first paragraph? Mr. Lennon's damages would be 10 cents on the 437,000 units?

THE COURT:It is just a matter of extrapolating.

MR. BERGEN: That is correct.

THE COURT: Anything else?

MR. BERGEN: No, that is all.

MRL SCHURTMAN: May I have the exhibit back, please?

THE WITNESS: May I say one thing, your Honor, that Exhibit 241 is pretty straightforward, and if you thought and if I perchance had my druthers, I would stay over for tomorrow and answer the questions.

Actually, no matter which way he asks the questions, it comes back.

THE COURT: That is up to you. You arrange it.

MR. GRANETT: We prefer that Mr. Posner remain overnight.

MR. SCHURTMAN: The only problem, we would be using up court time exploring all these different figures.

That is what I thought you wanted to avoid, your Honor.

THE COUPT: It all depends on how much. If it is just hour after hour, yes.

If overnight you can get an accountant so you can know exactly where you want to go and you can do it expeditiously, fine.

But if you can't, it is going to be an awful waste of time. And I don't know the best way to proceed.

MR. SCHURTMAN: I would suggest the method

your Honor proposed makes the most sense, because we would have a certain background.

THE COURT: You stay over and you try to get ready.

We should be able to handle it in a court proceeding. You were given that 241 this afternoon and you didn't have much time to think about it and see it. YOu will be a lot better off tomorrow.

THE WITNESS: The 241 is practically the same thing as the sheet we gave him last night, but a little less complicated,and it is straightforward.

THE COURT: Nobody knows whether there will be a subway strike tomorrow. You will probably all be coming down in taxiis, and if there is a subway strike, obviously, the roads are going to be uncertain.

I would like to set this at 10:30. But do the best you can to get here. I will understand if we have got a problem.

(Whereupon, an adjournment was taken to Thursday, April 1, 1976, at 10:30 a.m.)

hbbr 1

Big Seven Music Corporation, et al.

v. 75 Civ. 1116

John Lennon, et al.

New York, New York

April 1, 1976
10:30 a.m.

- - -

(Trial resumed.)

- - -

Additional Appearance:

Bernard R. Diamond, Esq.

- - -

THE COURT: Can we start with our witness? Are you still cross examining Mr. Posner?

MR. SCHURTMAN: Still cross examining Mr. Posner, your Honor.

MR. BERGEN: Your Honor, before we start --

THE COURT: Yes.

MR. BERGEN: -- I have had two of my witnesses in court for the last couple of days and another one on call. And I wondered if we could get some idea when Mr. Posner would be finished or when Mr. Schurtman would be finished with Mr. Posner so I could call the witnesses and tell them to come at 12 o'clock or 12:30.

THE COURT: What is your plan?

MR. SCHURTMAN: Not more than another hour with Mr. Posner. Depending on the answers I get.

THE COURT: How about that?

MR. BERGEN: 12 o'clock? Just to allow a little leeway?

THE COURT: Well, I don't want to have -- I mean, he might get through earlier. Let's see, does this complete Capitol's case?

MR. GRANETT: Yes.

THE COURT: And then we have Mr. Lennon's case, and who are you going to cal?

MR. BERGEN: I am going to call Mr. Lennon and another gentleman from the master cutting room and then I have an additional problem that I learned about last night. I have a third witness, David Marsh, who is a rock critic from Rolling Stone Magazine who is unable to be here for this afternoon. Now, I wondered --

THE COURT: Has he been available before?

MR. BERGEN: Well, yes. I mean he has been available before.

THE COURT: He is not available right now? When you say this afternoon, the thing is, could we --

MR. BERGEN: Well, I wondered if we could

hbbr 3

finish with Mr. Posner and then Mr. Lennon and this other Anthony Stevens, a gentleman from the cutting room, and then I thought maybe we could spend this afternoon with Mr. Levy's --

MR. SCHURTMAN: Your Honor, I have a problem. I have had the accountant who is going to testify in Mr. Levy's case in the courtroom every day since this trial started and his wife is in the hospital and he told me he could not make it today. Now, he was the man I have had here every day. I can have him again tomorrow but he simply --

THE COURT: Look, the only thing I can do is what we did before. You can put on witnesses in any order and obviously, unfortunately, we are going to go past this 17th day which is unfortunate. But at least, we can get the bulk of it done today. I think we can certainly get Mr. Posner off the stand quickly and the only thing I say is that we had better be prepared to do something right away after we get through with Mr. Posner.

MR. BERGEN: I will try to get Mr. Marsh.

MR. SCHURTMAN: Are you planning to sit tomorrow?

THE COURT: No, I am not.

I will talk to you about tomorrow and I will do

hbbr 4

what I can.

MR. GRANETT: Does that mean there will be a session tomorrow?

THE COURT: I don't think so.

MR. GRANETT: It is not imperative --

MR. SCHURTMAN: Frankly, your Honor --

THE COURT: Why don't you get --

MR. SCHURTMAN: I would prefer if you would not sit tomorrow but of course if you want to, I will be here.

MR. GRANETT: Is that definite that the Judge is not going to sit tomorrow?

THE COURT: Let us go off the record.

(Discussion off the record.)

THE COURT: All right. We are going on the record and we are going to continue with Mr. Posner's cross examination. Try to complete that quickly and Capitol will rest.

H A R O L D P O S N E R, resumed.

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q Mr. Posner, do you still have Plaintiffs' Exhibit 240 which was my questionaire concerning costs? I think we can probably make very quick progress if you could just fill in the figures for me. And let us start

again with Item 1 which are the recording costs.

Now, those are the costs that were used to make the record in the studio. Can you tell me what those recording costs were, both totals and on a per unit basis?

A For Capitol they were $6,300.

Q $6,300. Now, you are disregarding the $204,000?

A Yes, I am.

Q That were paid by Capitol but subsequently reimbursed by EMI?

A That is correct.

THE COURT: Mr. Bergen, we just started. I think this is about the first question.

MR. BERGEN: Thank you.

Q And is anybody simply eating those recording costs?

THE COURT: Wait a minute. We are going to get -- just ask factual questions.

Q Fine. So you have not included the 204,000?

A That is absolutely correct.

Q Now the recording costs that you have included are 6,300. Can you give me a unit breakdown in the 6.98 column and in the 5.98 column?

A It is a fixed cost so we don't look at it per unit but you just divide by 342,000.

Q All right?

A But it is a sum cost. It is not a per unit cost.

Q In other words, you did not deduct it at all in arriving at your profit figure?

A Of course that is not true.

THE COURT: Couldn't you have overnight gotten me a Xerox or something?

THE WITNESS: I have, your Honor.I have a simple sheet.

MR. SCHURTMAN: I will give you what he gave me.

THE COURT: Let's start with what he has.

MR. SCHURTMAN: I thought you had that.

THE WITNESS: I have a little bit better one I thought based on what you want.

MR. GRANETT: There is another column added to 241. That is what the witness is showing, your Honor.

THE COURT: Why can't you work with his sheet?

THE WITNESS: The difference, your Honor, is that the figures in blue are total costs.

THE COURT: Now let us see. Let us mark this as 241-A. It is a new sheet that Mr. Posner has developed.

(Plaintiffs' Exhibit 241-A was marked for identification.)

THE COURT: Have you got 241-A, Mr. Schurtman?

MR. SCHURTMAN: Yes, I do.

THE COURT: There are extra copies?

THE WITNESS: Yes, sir.

THE COURT: Allright.

MR. SCHURTMAN: Do you have 241-A, Judge?

THE COURT: I have got 241-A. Let us work with that.

Q All right. Let us start with 241-A.

Now, in the first line invoice sales, you have a column called methods used A. Now what does the A refer to?

A This would be the only confusing part of this page. I wanted to bring the source, the technique I used to get all these numbers. A stands for actual.

Q A is actual. When you say actual invoice sales, is this the wholesale price that Capitol charges and receives?

A That is correct.

Q To whom does Capitol charge that wholesale price? I now want to get into the details of your distribution set up.

A We have a price schedule. We have dealers, pure dealers and sub-distributors which are the one stops and the big dealers, so to say.

Q I am having trouble hearing this, Mr. Posner.

A We have basically two classes of customers. The dealers and the sub-distributors.

(Continued on next page.)

Q Now the dealers are the retail stores?

A Yes.

Q Like Korvette's and Goody's?

A Well, Korvette's and Goody's and the very big ones are somewhat of a mixture. They get competitive type--

Q They get special discounts.

THE COURT: Mr. Schurtman, I hate to interrupt but I think we are retreading.

He gave us yesterday, or even maybe the day before, the basis for this .3268 figure. We have that in the record.

MR. SCHURTMAN: Your Honor, I followed your suggestion and did a lot of homework last night and I discovered that apparently there is a problem relating to independent distributors which changes the whole picture that he gave you.

THE COURT: Now let's get that. I am familiar, I think, with the testimony given. If you can point out the distinction you are, the exact thing you want to get at now, please do.

Q Mr.Posner, many record companies distribute their records through so-called independent distributors; you are familiar with that term, are you not?

A Yes, I am.

Q Now, does Capitol use independent distributors?

A Yes, we have one.

Q One?

A He is in Hawaii and he does practically no business.

Q Other than that, Capitol uses its own distribution system, correct?

A Correct.

Q Have you in your computation included the costs that would be borne by the distribution part of your organization?

A In the cost side, not in the sale side.

Is that what you are asking?

Q Yes.

A The sales commissions are included, but not the sales force.

Q You have not included the sales force?

A That is right.

Q When you sell to an independent distributor, what price would you charge him?

A A lower price.

Q So that you would receive lower gross revenues?

A That would be correct. But we don't sell to independent distributors.

Q And the reason you receive lower gross revenues is because the distributor has his own expenses?

A That is a fair statement.

THE COURT: Let me hear the last couple of questions and answers.

(Record read)

THE COURT: Let me just think a second.

(Pause)

THE COURT: Do I understand that the so-called distributor is a level above what we have called the rack jobber?

A Yes. Some companies do not have their own sales organization. Capitol has its own sales organization, Columbia and others, but those that don't have to go through independent distributors. And they have their own organization and they do the selling for that company.

In Capitol's case, we have our own distributing organization, we go to the same accounts that the independent distributor does, the major racks like Thrifty Drugstores, or whatever you have, Korvette's and so on, and we sell direct.

THE COURT: Is the rack jobber -- that is what we might call the wholesaler?

A We happen to call it subdistributor because it

is a step below.

THE COURT: Subdistributors. OK. I was trying to remember that term. All right.

Go ahead, Mr. Schurtman.

Q Let's take that independent distributor you use in Hawaii. In the two columns that we have here, how much is the price that you charge the independent distributor in the $5.98 column?

A Currently it is $2.41.

Q How much is the price you charge him on the $6.98 column?

THE COURT: And this is the mixed or average price?

THE WITNESS: No. This happened to be the disc price.

THE COURT: The disc? Let me get the disc price again.

THE WITNESS: $2.41.

THE COURT: On the $6.98 column?

THE WITNESS: $2.81.

Q Are you in a position to give us a mixed price so we can compare the two?

A Possibly. I could work one out but it is all unimportant in my judgment. We could get the statistics

that show that our Hawaii distributor is less than 1% of our sales.

Q That is not my point, sir.

A For all practical purposes we just don't use it to muddy the water.

Q Mr.Posner, what I am trying to get at is if you used an independent distributor, or if you were to use an independent distributor, your revenues in the first column would be approximately 60 cents less per album.

Now, can you give the Court any indication of what portion of this 60 cent differential would represent expenses, because the distributor obviously has expenses in running his distribution system?

A That is true. Of course the number I read you is 40 cents, so that you are kind of off there. But I might tell you, Mr. Schurtman, what you are driving at we can cut through the water, is we prepared here in good faith what our sales revenues were and our direct costs attributable to this product. We did not put in overheads.

If you look at any profit and loss statement of any company -- I shouldn't say any company -- but probably almost any published statement that you will find, there is a thing called sales, gross margin or gross profits, it is

used interchangeably, and then profit. And between gross margin and profit is called SG&A -- I am sorry, selling, general and administrative expenses.

The reason we call those overheads is whether we sell the Mr. Lennon album or not or whether we lower or raise our prices or not, or we put out an album by my son or not, our sales force is still going to be the same number of people. They still make the same calls on the customers. It is sort of a relatively fixed cost. It is one of the things we have built into Capitol Records.

Now it is true the commission portion is not a fixed cost because every time we sell a unit we pay the salesman a commission.

Now if that is what you are driving at, so be it, but I want you to be clear that we are prepared to tell you every cost we have but which are the type of costs that are sales less the costs specifically related to those sales on a fixed and variable basis.

MR. SCHURTMAN: Your Honor, at this point, every time I ask the witness for specific information, he gives me this whole argument.

THE COURT: No, no.

MR. SCHURTMAN: I don't object to that but I want to point out to you, I am still trying to get the basic

facts. We can argue legal implications later. But we have a time problem here.

If we are going to run down some blind alley, I don't want to spend a lot of time running it,and what the witness is doing is to try to explain where this sales force cost fits.

Q The thing you came up with this morning, and he admitted right at the outset, is that in his list of costs, on 241A for identiiication, he does not include the costs of Capitol's sales force.

Right?

A Correct.

THE COURT: Although you have included commissions where commissions were earned so much per record, right?

THE WITNESS: Right.

THE COURT: OK.

Now he is saying that from an accounting standpoint, the question of whether-- he is saying that Capitol's profits would be the same.

No, that isn't the right way to put it. He is simply saying that the sales force costs are there fixed. They are not varied depending on how many albums of John Lennon are sold or the price of John Lennon albums. It is

a fixed cost.

Now if it is a fixed cost, I really don't think that affects the damages, does it?

(continued on next page)

MR. SCHURTMAN: I think you have two problems. In the first place, the issue of whether the fixed cost can be ignored completely in setting up profit figures is a complex one. I have read the case that Mr. Prettyman cited and I don't think it answers that question. If we ever get that far in this case, your Honor, it is going to be one of the points you will have to decide. I don't know how you are going to decide it. What I would simply like to get is the underlying facts at this point. Let us find out what the fixed costs are. You can then decide whether they should be included or excluded. The only thing I asked him, of this 60 cents differential in gross revenues, how much of that would represent cost and how much would represent profit to the distributor, because the profit portion they are obviously entitled to get if they run their own distribution system. Whether they are entitled to ignore the cost element is a question you will have to decide later.

THE COURT: Let me understand this 241-A for identification; let me understand the general scheme of it. You start at the top with sales?

THE WITNESS: Yes sir.

THE COURT: And you got a column with respect to the actual price of the Lennon album?

THE WITNESS: Yes, sir.

THE COURT: Then you got a column for what would have been if it had been priced a dollar higher?

THE WITNESS: Yes, sir.

THE COURT: You have got units and totals?

THE WITNESS: Yes, sir.

THE COURT: Now, what kindof costs have you included in it? You have got a column adding up total variable costs?

THE WITNESS: Yes, sir.

THE COURT: What kinds of things are variable costs? Why do you separate variable costs from fixed costs?

THE WITNESS: Well, first I will tell you why I separated it and then I will try to explain why they are. Variable costs are those tht as you sell more units you incur more costs. They are related to the sales volume. If you sell one unit you get $306, and if your manufacturing costs will be 6 cents, if you sell a million units, your revenue would be 3,060,000, whereas your standard manufacturing costs would vary in direct relation to the volume, would be $400,000 in this particular case. We sold 342,000 units in the United States. Therefore, if you take your $3.06 average mixed sales price, the revenues in the

column to the right are $1,047,000. If you take manufacturing costs, it is 40 cents per one unit, but times 342,000 units, it is $136,900. So that all the costs in the unit columns at $5.98 and $6.98, you simply multiply by the units sold, which are 342,000 in the United States and get the total cost.

We do incur some fixed costs when you put out an album.

THE COURT: Mr. Schurtman, I have not read the case, but just as matter of logic and common sense it would seem to me that we could reason out right now the type of allowable things, the type of things that would be relevant to Capitol's damage claim. Capitol is making a particular type of claim. It is not making a claim that its entire business was swept away, that a plant was burned, or something like that, and is a different type of claim that might raise different questions and require different evidence. But Capitol's claim is that it was compelled to reduce its price, and it does seem to me that on that kind of claim you have to figure out what profit Capitol would have made had they not reduced the price.

Capitol contends that the president of the company would have been there, whether they charged $6.98 or $5.98, and it would not have changed that dollar gross

profit by one penny. So I don't think we have to have evidence about the salary of the president of the company.

MR. SCHURTMAN: I agree.

THE COURT: There are many, many other things like salary of the president. Now, it is a matter of fact, if, in fact, there sales force would have been augmented because of the increase in price or was diminished because of the reduction in price, then if that is true as a matter of fact,you have every right to go into it. It would be of great interest.

But if it is true that there are things like the salaries of the executives, the rent on the building, whatever they do, mortgage payments, and the salaries of their own sales force, if they were not reduced by the reduction in price or would not have been greater by an increase in price, if that hypothesis is true, I don't care what the salaries were of the sales force. It could make no difference.

MR. SCHURTMAN: If that were the only issue in the case, I would agree. You are absolutely correct as far as the price reductions are concerned.

But they arealso claiming in addition to the price reduction that but for the Roots album they would have sold several hundred thousand additional albums. That is the

second point.

THE COURT: Go one step at a time. It is just a truism, any cost which would not have been greater at the $6.98 price then is not relevant to that claim?

MR. SCHURTMAN: I agree.

THE COURT: What about the claim that they would have sold more units? It is the same basic principle to any cost which would have been increased had Capitol sold more units, obviously has to go into the reduction of the gross profit on such sales, and you are saying that even if Capitol had sold 600 or 700,000 of these records in the United States versus the 342,000, you are saying that the sales force would not have been increased?

THE WITNESS: Absolutely, it would have gone in and taken an order, instead of ten units, for 20 units, instead of thirty units, fifty units. I can't think of anything at the moment that would change the fixed costs.

MR. SCHURTMAN: That is where you get into a fallacy, Judge, because in this secondary matter I am not talking about the price differential. You are now trying to figure out what the profit should have been on a bunch of additional record sales. You have first to figure out what the original profit factor would have been, and then you multiply it by the additional sales.

Now, in order to figure out the original profit factor there, you do have to take in fixed costs in order to find out what the profit is, because when these gentlemen make up their budget at the beginning of the year -- and we have seen a sample of the budget -- they decide "We are going to sell so and so many records and we are going to base our budget on those sales."

And then they figure out their original profitability. They divide their fixed costs plus their variable costs by the number of units they expect to sell.

So when they now come in and say, "Judge, on 342,000 records our profit would have been so and so per unit and therefore, we want the same profit on the additional sales less variable costs," they first have to give you the basic information of what the profit would have been on the first 342,000.

THE COURT: But he has got it in his chart.

MR. SCHURTMAN: He has left out every penny of fixed costs.

THE COURT: The way I get it, what you are telling me is this -- correct me if I am wrong -- for certain purposes Capitol projects profits and, naturally, in that projection they take into account all the costs,

mmbr 7 Posner-cross

and if they were figuring out for some reason a profit per album, they would naturally figure out a profit per album taking into account all costs. Right?

MR. S CHURTMAN: Yes.

THE COURT: Now, when they originally make those projections, naturally all costs are allocated over all albums in figuring the per album profit. Now you are saying that in order to figure a valid and proper profit per album in connection with the alleged additional albums they would have sold, you say they should do it the same way, they should allocate not only their variable costs, but their fixed costs over those additional albums? Isn't that basically it?

MR. SCHURTMAN: With one slight difference: Before they get to the additional albums, when they give you the basic figures -- because that is what they do, they give you a basic figure and then say multiplied by the additional albums -- that basically should include a portion of the overhead.

THE COURT: Whatdo you mean basic figure?

MR. SCHURTMAN: Well, they tell you, "We will make a profit of $1.47 per album."

THE COURT: Maybe we can help establish something that would permit me to have the facts. I don't think it is

all that difficult.

Mr. Posner, let me ask you this, the left-hand column, that figure of $1.23 down at the bottom, now, that is a profit before overhead?

THE WITNESS: Yes, sir.

THE COURT: And by overhead we would include all fixed costs of Capitol?

THE WITNESS: Yes, sir. Not all fixed costs: I have put some fixed costs in before, but, basically, all selling, general, and administrative costs.

THE COURT: For any purpose does Capitol figure a per record profit based upon an inclusion of overhead? Do you ever do that?

THE WITNESS: Yes, we do.

THE COURT: Do you do it for a particular album, like a John Lennon Rock and Roll album?

THE WITNESS: Yes, we do.

THE COURT: Now, let us leave that for just a moment. Move over to the other part of that left-hand column where you have got total costs. Now, we are still on the $5.98 price column. You have got total fixed costs of $57,800 allocated to that album.

THE WITNESS: You can tell which they are by the dot that is on the left.

THE COURT: Well, I am looking at the 57.8 figure. That means $57,800?

THE WITNESS: Yes.

THE COURT: What is the $57,800? You tell me in your own words.

THE WITNESS: Well, if you look before you will see seven items that have a dot in front of them. These are what we call -- maybe the word "fixed costs" might mislead. It is an investment cost if you make in an album, some costs that you incurred, whether you sell one unit or one million. It is a cost. As Mr. Schurtman is trying to point out, recording costs are fixed costs, whether it is one unit or a million units. So that is $6,300.

THE COURT: So the $57,800 really refers to certain fixed costs associated with this album?

THE WITNESS: Yes,sir.

THE COURT: But it, of course, does not include the allocation of the enitre overhead of the company?

THE WITNESS: That is correct.

THE COURT: Now I go back and ask you this -- I don't know whether this is your problem or not, Mr. Schurtman, but I am trying to think of a way of getting the record complete without spending another 18 hours on it -- I think we can sort out the legal issues. Mr. Schurtman,

are you concerned about getting a complete allocation of all overhead in connection with this album?

MR. SCHURTMAN: I want to getbasic profit figure.

THE COURT: I want to know from you if you have such a figure, in other words, a complete allocation of overhead for this album? Do you have such a figure?

THE WITNESS: Yes, I do.

THE COURT: What is that?

THE WITNESS: It would be approximately 14 percent of sales.

THE COURT: Can you translate that into a per unit figure and a total figure, dollar figure?

THE WITNESS: Yes, I can.

Could you just give me a second?

THE COURT: Yes.

THE WITNESS: At the $5.98 the allocation would have been approximately $151,700.

THE COURT: Let me just get it. This is the overhead allocated to the Rock and Roll album?

THE WITNESS: Yes.

THE COURT: This is the dollar figure?

THE WITNESS: Right.

THE COURT: And the dollar figure is what?

THE WITNESS: $151,700.

THE COURT: Now, does that include the $57,800?

THE WITNESS: It does not.

THE COURT: So if I wanted to come down to the final net profit figure in your left-hand column, I would subtract $151,700 from $362,600?

THE WITNESS: Yes, sir.

THE COURT: That gives you $210,900. Now, can you translate that into a per unit figure?

MR. SCHURTMAN: Excuse me. I think we left out one subtraction. I think he said the $57,800 was included in the $151,700, so you have to subtract that too.

THE COURT: I have already done it.

MR. SCHURTMAN: Then I am way behind you. Wait a minute. Maybe this does not work out right.

THE WITNESS: It does.

THE COURT: Can we pause here a minute?

(Pause.)

THE COURT: You tell me how you get on your Exhibit 241-A for identifiction the $362,600.

THE WITNESS: Simply. If you look at the net sales line after discounts, it is $1,042,900. I subtracted all the variable per unit costs, which are $622,500.

I then subtracted the fixed cost in this of $57,900, and,hopefuliy, if I struck right, it would be $362,600.

THE COURT: I would still need to know this, the $622,500 figure, does that include the items with the red dots in front of them?

THE WITNESS: No.

THE COURT: I understand now. It is fine.

Now, again, I just go back to the $151,700 figure. If I wanted to get the total fixed costs and overhead, I would take the $151,700 and add it to the $57,800?

A You would be cleaner if you wanted to allocate your overheads, you would allocate $151,700.

THE COURT: What I am trying to get at, if I want to end up having a complete record of evidence here, I want to know by distinctions. You have distinguished here what you call the variable costs which would vary depending on the price of the record.

THE WITNESS: Yes.

THE COURT: And the things that are not thus variable would be what we called overhead?

THE WITNESS: Yes, sir.

THE COURT: $151,700?

THE WITNESS: Yes, sir.

THE COURT: Another thing you said would not be thus variable would be these red dotted items?

THE WITNESS: Yes, sir.

I misunderstood your first question. You are correct.

THE COURT: And so if I want to take the total non-variable cost items associated with this item, I add $151,700 to $57,800?

THE WITNESS: Yes, sir.

3 am

THE COURT: Let's just have that figure-209,500. Now is it possible to calculate the per unit amount in connection with that total dollar amount, 209,500?

THE WITNESS: Sure.

THE COURT: And what is that?

THE WITNESS: I have 61 cents.

THE COURT: All right.

Now, our figure of 209,500 would be exactly the same in the right-hand column, would it not? There is no difference if we charged $6.98?

THE WITNESS: Well, there would be, your Honor.

THE COURT: Would there be?

THE WITNESS: If you wanted to go through this exercise, and I have that number.

THE COURT: What is that number?

THE WITNESS: The 57,800 would remain identical.

THE COURT: Right.

THE WITNESS: No chance of changing that.

THE COURT: OK.

THE WITNESS: The overhead, if you allocated fully on the basis of revenue, it would have been 173,500.

THE COURT: OK. And what is your total then?

THE WITNESS: 231,300.

THE COURT: And what is the per unit?

THE WITNESS: 68 cents. I rounded those to the nearest penny.

THE COURT: Don't we have our record complete now? In other words, if I am supposed to end up with allocated overhead, I will be able to allocate it.

MR. SCHURTMAN: Except we are still missing one overhead item.

THE COURT: What is that?

MR. SCHURTMAN: I don't think it is overhead but one item. That is the 204,000 production costs. It costs them another $204,000 to produce this album.

THE COURT: Well, all right.

MR. SCHURTMAN: And they have shunted that -- I won't say shunted-- they have said well, that is being paid by EMI.

THE COURT: I have that evidence. What we are trying to do here this morning so we can get --

MR. SCHURTMAN: Is just the fact.

THE COURT: In other words, I have got the facts on that. If that be somehow allocated to Capitol as an additional cost I know the amount. Don't I?

MR. SCHURTMAN: Yes, you do.

THE COURT: And I now know the overhead figures.

MR. SCHURTMAN: May I focus on some other

aspects?

THE COURT: OK. Fine.

Q One preliminary question.

Mr. Posner, the overhead figures that you have just given to the Court, would they include the expenses of your in-house distribution system?

A Yes, they do.

Q They do. OK.

Let's move on to the -- you have in there a line saying "provision for future returns" which shows up as a negative figure, meaning it is an additional profit item you want from us.

What is that? Can you explain that figure to the Court?

THE COURT: Read the question,please, Mr. Reporter.

(Question read)

A I will try. It is probably the most-- not straightforward number on this whole sheet. What it is, is in the record business, when you sell records, you know that you are going to get returns. And we provide a reserve for returns. It is a very complicated formula set up by our two auditors over the years. The additions and subtractions to the reserve depend upon certain things; namely, the level

of returns that you have had in the prior twelve months, whether it has gone up or down, and also the level of sales, and when you work this formula together, at the end of the year, it is decided whether you need to put more money in the reserve because returns are getting out of hand or getting worse, or less money in the reserve.

In fiscal 1975, since our return experience improved, and we had less returns, we were able to take money from the reserve, we didn't have to provide, we were able to release money from the reserve and it had a small favorable effect on the line of $13,000, or four cents.

THE COURT: Incidentally, I think we ought to receive this 241A we have been talking about.

(Plaintiff's Exhibit 241A received in evidence)

Q Now, standard manufacturing costs of 40 cents per album. I think you told us yesterday that this included your pressing costs and it also included your jacket costs and labels and what have you. Am I right in that?

A Yes, sir.

Q Who does your pressing? Do you have an in-house pressing plant?

A Yes, sir.

Q Is that run as a separate division?

A Well, if you mean it is a part of the manufacturing

division, yes, but it is part of Capitol Records.

Q Does Capitol Records treat it as a separate profit center?

A No.

Q There is no break-out of pressing profits?

A No.

Q Your pressing plant also presses for outsiders, don't they?

A Yes, they do.

Q And how much do they charge outsiders for the same type of package?

A A little more than they charge insiders; it is called customer or creative business.

Q Isn't it a fact that they would charge outsiders about 55 cents for this combined package?

A I don't know the exact number, Mr. Schurtman, but I suspect you are far off. Com petitively, it would be less, but these are just absolute-- I just bring you all sorts of documents stating that this is what our standard cost is. We certainly don't deceive ourselves.

Q But the pressing problem--

MR. BERGEN: Your Honor, I am going to object to this. What is happening here is exactly what your Honor predicted two nights ago. Where Mr. Schurtman complained

that he didn't have the costs, we gave them to him. And then your Honor said that he would then begin to attack the costs. That is exactly what he is doing. What we are engaged in is discovery. This isn't cross-examination.

He has got the costs now and he doesn't like what they say, so he starts to rip them apart.

MR. SCHURTMAN: What is thepurpose of cross-examination if not to rip apart the other side?

MR. BERGEN: This isn't cross-examination. This is didsovery, it should have been done in discovery.

MR. SCHURTMAN: We didn't even know what your claims were until this trial began.

THE COURT: I just have a practical problem here. If you have got a few points like if you know that outsiders were charged 55 cents and you want to get that into the record, ask him about that.

I assume you are not going to go down each and every item.

MR. SCHURTMAN: There are certain, some of the key --

THE COURT: Let's wind it up. We have a witness that is coming in at noon.

MR. SCHURTMAN: Judge, I wonder if I could make another suggestion.

THE COURT: All right.

MR. SCHURTMAN: In the first trial you decided to sever liability and damages sor the obvious reason: why take a lot of evidence on damages until the issue of liability has been established.

Now here you are theoretically having a damages trial, but actually there are two separate issues here.

Issue No. 1 is: Did we force them to reduce their price, and did we cause them a loss of sales?

If you find against them, on both of these issues, then we don't have to go any further.

THE COUR. I am not going to split it up any more. This thing has gone on and on.

MR. SCHURTMAN: What I would suggest is simply this: That you limit your findings at this point to whether we caused them any loss of sales and whether we caused them to drop the price or not.

And then have a master decide the profits.

THE COURT: No, no. Look, Mr. Schurtman, you had this witness on for a long time yesterday. I kept urging you to get to the point of the profit. You asked him a lot of things that you really didn't know anything about and very late in the afternoon, and it seemed to me like a quarter to four you started asking him about the

profit situation. He stayed overnight. You have known for two days that this is the main thrust of his testimony.

I think we are in the course of finishing with thiswitness. I don't think you are being prejudiced or anybody is being prejudiced because you are being selective.

But let's pick the points that you wanted to go into and finish it up. I think there is a way to accomplish it in a very few minutes.

MR. SCHURTMAN: I am not going to cover every line, Judge.

THE COURT: Now let's try to make time.

What are the points you want to ask him about?

Q Now on the pressing plant, are the expenses of the pressing plant included in the fixed overhead figure that you gave the Court?

A No. They are included in the two lines called standard manufacturing costs and production variances and package deviation. Those three lines, the first three lines that you have.

Q Are you saying that all of the fixed and variable costs of the pressing plant have already been taken into account?

A Yes.

Q I think there was an objection when I asked the

last question: What do you charge outsiders for the pressing plus a jacket, plus labels and so on.

A I am going to amend my statement somewhat there because I am not sure whether your 55 cents was very high or not very high. But we do charge in our custom business and our so-called premium business the going competitive rate, depending on the type of jacket and album that is manufactured that other competitive manufacturing plants do in order to remain competitive.

If we didn't have that business, and we just wiped it out entirely, these would be our costs to our own internal.

Q Let's move on to the AF of M line for which you show nothing.

Don't you pay any AF of M fees?

A Not on Beatle products.

Q Who pays them?

A Apple Records.

MR. SCHURTMAN: For the purposes of this case, that Mr. Lennon --

THE COURT: Apple Records pays it. That is what his knowledge is Now let's go on.

Q How about AFTRA?

A The same.

Q Apple pays them?

Now, recording costs, just to be clear on that, do not include the 204,000, right?

A Correct.

Q The sales commissions, do those include the commissions that your distribution setup pays?

THE COURT: Do you have a question?

Q You have told us you have an in-house distribution system as opposed to independent distributors, and the in-house distribution system pays commission.

A Yes, sir.

Q Are those the sales commissions referred to in here?

A Yes, sir.

Q What about advertising for this particular Lennon package? Where would that be included?

A Under direct merchandising, you see a number with a dot in front of it of 38,600 and a number above it of 3,600. That's the total.

Q I am not sure if we have the right figures. How much was the total advertising expenditure for the John Lennon Rock and Roll album?

A Let's try to answer that a little differently.

You might recall Mr. Zimmermann testified on the

preparation of the TV, the radio spots, the buttons, the posters. All those costs are exactly that $38,600.

Q So your testimony is--

A Now, in addition, we have a line called Co-op Advertising, which fits just below AF of M and that shows $67,000. We, to implement these radio spots or to do local newspaper advertising in cities and what have you, our sales force has a cooperative expenditure that they use related to sales volume and that is what we estimate that to be.

Q The television and magazine advertising, point-of-sale promotion, tee shirts, posters,and all that, is that $38,600 figure?

A Yes. The only thing you wanted to get straight in your mind is it is the full advertising that went in the national magazines and it is the production work that went into the radio spots. But in addition, there's local advertising and local radio stations and the radio station's air play.

Q But that is covered by Co-op?

A Yes, sir.

Q What I don't understand is you have a dot in front of the $38,600, which I take it is an indication to the Court that that is part of fixed overhead?

A I have charged it as you can see, and it is part of the fixed costs related to this album.

As I say, we have a certain investment which we call sunk costs. We invested in those posters and production of the radio spot and the consumer advertising.

Q Yes,but did you deduct that in arriving at your $1.23 profit figure?

A Yes. We said that before.

Q What?

A We said that before.

THE COURT: Wait a moment.

$1.23. I guess I still don't understand how you got to the $1.23. Did you take out an amount? What did you do?

THE WITNESS: I simply subtracted from the $3.69 which is a per unit income all these unit costs that you see, a number in that column called Unit Costs. I came down to $1.23.

THE COURT: No. Wait a minute. What is the $1.82?

THE WITNESS: That is the sum of all the costs,per unit costs.

THE COURT: Oh, sure, all right. But there is nothing there for direct merchandising --

THE WITNESS: That's right.

THE COURT: -- in the unit?

THE WITNESS: Because that is a fixed cost, it is a sunk cost, and I showed them separately for you so you could see the distinction yourself, your Honor.

THE COURT: OK. But I guess another figure that might help. Can you translate the 57,800 into a per unit cost?

THE WITNESS: Of course I could but the application -- I will wait for the cross.

THE COURT: No, don't.

Can you do that right now?

THE WITNESS: Yes, sir.

THE COURT: OK.

(Pause)

THE WITNESS: 17 cents.

THE COURT: Can you do it with respect to the right-hand column?

THE WITNESS: It is the same 17 cents.

THE COURT: All right.

Q What I don't fully understand is why would you include tee shirts and TV ads and everything that pertains to this particular album in fixed overhead which you say should not be included in determining the bottom line profits?

A Unit profit or total profit, Mr. Schurtman?

Q Well, either one, if I look at your Exhibit 241.

A Well, it certainly is deducted when you get the total profit 362.6. I have deducted the fixed cost.

In the unit cost, since we don't consider it a unit cost, we consider it a fixed cost-- we invested in those tee shirts and those production and radio spots and if they had sold twice as much, we would have still or half as much or nothing, that is what the cost was.

Q Just a moment. Look at Exhibit 241 for a moment which was the one you gave me yesterday.

Now there you came up with two profit figures: $1.23 per unit and $1.47 per unit. Right?

A Yes, sir.

THE COURT: And those are the profit figures that you used in your damage computation?

THE WITNESS: Yes, sir.

Q Mr.Posner, you told the judge that if he finds that you wouldhave sold 100,009 albums more, he should multiply times $1.47.

A Yes, sir.

Q Mr.Posner, now in arriving at the $1.23 and $1.47,you did not include the tee shirts and television advertising, the posters, the buttons and so forth, that were used in selling this particular album?

THE COURT: He has already said that.

MR. SCHURTMAN: I am trying to find out --

THE COURT: And he has already told us why.

I don't know why we have to repeat. He said that he would have- if they had raised their price to $6.98, they still would have bought the same number of tee shirts, right?

THE WITNESS: Yes, sir.

THE COURT: In other words,you are not buying a tee shirt per album, right?

THE WITNESS: Yes, sir.

THE COURT: OK.

MR. SHURTMAN: I am not talking about raising the price now. I am talking about--

THE COURT: But all I ask you, Mr. Schurtman, is to remember his testimony. He has told you why. Now you may not agree with it, but that is his testimony.

THE WITNESS: In fairness to Mr. Schurtman,your Honor, I should mention one thing that you will find on the estimate of damage forms which I don't remember the exhibit number of.

When we spoke about the additional sales that we thought we had lost --

THE COURT: Yes.

THE WITNESS: -- I multiplied the number of sales times $1.47. But then I said if we had sold that many more units, we would have spent more money in direct merchandising.

It is another type of fixed amount. I talked to Mr. Zimmermann --

THE COURT: And you added $25,000?

THE WITNESS: Yes, sir.

THE COURT: OK.

Q Well, on the Co-op advertising, $67,000. Let me take it one step at a time.

First of all, do you claim that your co-op advertising expenditures were less than they would normally have been because of the alleged Roots interference?

A Our co-op expenditures are a difficult thing, your Honor-- we don't keep track of co-op by album throughout the country. We simply know that our sales management is allowed to spend a certain percentage of every sales dollar that they bring into the company on cooperative advertising.

The numbers that you see here are simply that given those level of sales, they would have been allowed to spend that much money, and if you sold more, you would have been allowed to spend that much more.

If you raised the price and sold the same units, since you got added revenue, they would have been allowed to spend that much more.

I must tell you in truth, I don't have and Capitol doesn't have available the actual dollars that were spent and it is very difficult to advertise in a newspaper twenty albums -- one of them might have been John Lennon -- we just don't keep our records that way but it is the fairest approach we could find over the years.

Q Now, look, according to your figures, if I add them up correctly, you spent $105,000 total in advertising the Lennon album. I am adding up $38,000 --

THE COURT: OK. Next question.

Q Can yougive us the comparable figures for Mind Games and [illegible]ls and Bridges and Shaved Fish?

A [illegible]on't have them at my fingertips but it would be as far as coop, we would do the same thing. We would have taken the sales revenues that we had in each period of time and whatever the co-op allowance was at that time.

We have changed it over the years as our business has changed. We have raised it in fact. But it would be an expression of multiplying --

THE COURT: Now look, what about this direct merchandising? Would you have spent more on those others,

do you know?

THE WITNESS: I don't know right now, your Honor.

THE COURT: All right, he doesn't know.

MR. SCHURTMAN: Can we get those figures?

THE COURT: We will take care of that later.

Now you ask questions that he knows the answers to.

Let's see if Mr. Schurtman has anything more.

MR. SCHURTMAN: If he can't answer the advertising figures --

THE WITNESS: I do have one recollection on Mind Games, -- on Walls and Bridges, rather. To my best recollection, Mr. Schurtman, it was $62,000.

THE COURT: For what?

THE WITNESS: On the direct merchandising.

THE COURT: On which album?

THE WITNESS: The one preceding which would have been Walls and Bridges.

That, I have to say again, would be my best recollection.

Q $62,000.

THE COURT: OK. Anything else?

MR. SCHURTMAN: I am just checking my notes, Judge.

I do have one other question.

Q Mr. Posner, looking at Plaintiff's Exhibit 137, these were the notes that you made after Mr. Zimmermann gave you his projections.

I notice that it indicates that the profit would be 16% of sales.

A Correct.

Q Mr. Posner,I notice that the profit figure you have given the Court, I think we figured it out yesterday, is about 44% of sales.

Can you explain the difference?

Q What is the difference?

A It revolves around this whole question that the judge sort of asked and you did on allocations of overhead, when you do evaluate. You asked me this question. On an artist or a contract that is coming up, we have always provided our analyses in two parts. It says given these sales, we expect to make this type of contribution. You remember that word on there? The contribution is another term for profits before overhead, or it is contribution to the overhead.

So our management knows that, well, we can make--having this, if the overhead stays the same, this is the incremental profit we will get. It will just flow straight through to the bottom line because overheads won't change.

But then we also say we don't want to make all deals on a contribution basis, so now if you just allocated the overheads on a pure percentage of total sales, it is share; you would have a profit after allocation of overhead.

I can add to this because you brought up some things that I felt were not fully understood before or should I wait for my counsel to ask.

Q Mr.Posner, let me just ask you this.

THE COURT: What is the exhibit you are speaking of?

MR. SCHURTMAN: This exhibit, your Honor.

THE COURT: OK.

MR. SCHURTMAN: It is Exhibit 237.

Q Which I take it was your computation of profit made on February 7, 1975, based on sales of 400,000. And you showed that the profit would be 16% of your total sales, right? That is what it shows?

A The profit after allocation of all overheads.

Q Right.

What I would like you to explain to the Court, Mr.Posner, is why in your own internal profit computation on February 7, you said the profit would be between 15 and 16% of sales while in the computation you have submitted to the Court today, for purposes of this trial, you have said

the profit should be 44% of sales.

A Well, first, let's make a correction. The 44% is really 34.6.

THE COURT: All right. Where is the percent? What is that taken from in this figure?

THE WITNESS: If you divided the 362.5, which is the profit before overhead, by 1,047,000, you would get 34.6%.

THE COURT: Is the difference overhead?

THE WITNESS: Primarily.

THE COURT: OK. That is the difference.

Any other questions?

Q The only other question is: In making your internal profit computation, on February 7, 1975, why did you take overhead into account while not doing it for purposes of now claiming damages from us?

A I would be delighted to answer that question.

THE COURT: I think really it is so obvious. When they figured out 237, they were not making a damage claim. They didn't have a counterclaim in a lawsuit against Morris Levy.

MR. SCHURTMAN: That is the whole point.

THE COURT: It is the whole point and it is a legitimate point. It isn't a guilty point. All right.

MR. SCHURTMAN: I guess I have nothing else.

THE COURT: All right, do you have anything else for this witness?

REDIRECT EXAMINATION

BY MR. GRANETT:

Q Mr. Posner, in Exhibit 241A, there is a line called pressing fee. It is 11 cents in one column and 15 cents in the other column.

Who receives that pressing fee?

A EMI.

Q Is it clear -- this pressing fee, why does EMI receive that?

THE COURT: We have had that. We have had that many times.

MR. GRANETT: The point that prompted me to raise this question was that several times Mr. Schurtman said that the 204,000 EMI cost was shunted aside.

THE COURT: Please, that is argument. There are no new facts on that we need to have.

Anything else?

THE WITNESS: Do I have the right to talk to my counsel for a minute?

THE COURT: Yes.

THE WITNESS: Can he come here?

THE COURT: All right, you come up and talk to the witness. And we will try to finish this.

(Pause)

Q Returning to Exhibit 241A, the indication at the bottom of the $5.98 column, 362.6, is there a reason why you didn't go beyond that in the projection of profit?

A Yes, there is. And I beg the Court just a minute to explain this so it is clearly in the record.

You specifically asked the question when we make these deals with artists and others, do we look at it profit allocation as well as contribution or profit before.

Now I just explained to you, yes, we do, but in the real world, we know that, and I guess your Honor just covered it, mentioned it yourself, that given this album, let me rephrase that.

If our sales went up or down, unless a substantial difference, unless we took on an entirely new label --

THE COURT: I really think you explained that earlier.

OK. Thank you very much. OK.

Now, does Capitol rest?

MR. GRANETT: Subject to two things, your Honor.

THE COURT: Subject to what?

MR. GRANETT: Mr. Prettyman made a statement to the Court about submitting himself for cross-examination vis-a-vis legal fees and it was held in reserve before he departed.

The other is with the Court's permission, I would like to refer to the very brief, to the colloquy we had this morning about the possibility of making application to the Court for submissionof testimony by Mr. Evans, the Canadian manager of Capitol.

Your Honor indicated --

THE COURT: What is the reason for that?

MR. GRANETT: Well, in view of the colloquy we had today,your Honor might feel that the exhibits that relate to the Canadian figures could be taken subject to connection of Mr.Evans.

THE COURT: Look, Mr. Granett, while we were waiting for some telephoning at the beginning of the day, we had a discussion off the record. I indicated some doubts about the extent of proof with respect to the comparison with Canada.

Mr. Posner said that he had received a telegram from Mr. Evans, head of the Canadian operation, explaining the situation with respect to Canadian sales as far as promotional materials and so forth.

I wanted to state on the record that obviuosly I have to review the record and determine as with respect to all issues, whether there is proof that would permit me to base some kind of a calculation on the Canadian comparison.

And I haven't done it and I reviewed that very carefully,and I will review the whole body of evidence as carefully as I can.

There should be no, prior to the off-the-record conversation and the remarks of Mr. Posner, I had not heard anything about a telegram from Evans and I don't know that Mr. Prettyman intended to put that or have the witness testify about it or whether you did. I don't know. We were just talking off the record.

But we have to get this case finished. Capitol has had several days to put on its evidence on its counterclaims except for the quantum of legal services.

Thatis held in abeyance. Everything else Capitol has had several days. Capitol, as I understood, was prepared to rest. Capitol has had a full opportunity to bring whatever witnesses it needed to present its case,and I am epxecting you to either rest or put on your witnesses right now. And which do you wish to do?

MR. GRANETT: In response to the reference to

telegram, I had intended to offer it but in view of the off-the-record colloquy, I abstained from doing so as not to offend your Honor.

THE COURT: Please. I don't know how anybody gests the idea I would be offended by offering some evidence. I may sustain an objection.

You want the telegram marked for identification, you want to offer it? That is the best way to make your record. I am not offended by that. I might sustain an objection.

Do you have the telegram?

MR. POSNER: Yes, I do.

THE COURT: OK. Let's get it marked for identification.

xx (Defendant's Exhibit DN marked for identification)

THE COURT: Do you offer DN?

MR. GRANETT: I do, sir.

THE COURT: Is there an objection?

MR. SCHURTMAN: May I see it?

(Pause)

MR. SCHURTMAN: I object.

THE COURT: May I see it?

THE COURT: Objection sustained.

What is your position?

MR. GRANETT: Capitol rests.

THE COURT: Capitol rests.

All right. Thank you.

(Witness excused)

THE COURT: We will take a very short recess. And then we will have Mr. Lennon's case.

MR. BERGEN: That is correct.

(Recess)

JOHN LENNON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BERGEN:

Q On Tuesday, during one of the recesses this week do you recall watching the commercials for Mind Games, Walls and Bridges, Rock and Roll and Shaved Fish?

A Yes.

Q Who conceived the idea for the commercial for Mind Games, the one with the Queen?

A I conceived it and I carried it with the help of some TV professionals.

Q Can describe basically what you did in conceiving and carrying out the commercial?

A I used a guy who worked for Apple who does some rather good imitations of the Queen of England.

Q What was his name?

A Tony King. And we got him to perform as the Queen of England. He was doing it in the car one night, and I said, "That is great. Let's make a commercial for an album like that," and so we got him the outfit from wherever you hire outfits and we hired a place and we made the film of him as the Queen.

Q Did you supervise the actual filming?

A Yes, I was there, I supervised the whole thing.

Q Can you describe what you did with respect to the commercial for Walls and Bridges?

A Well, Walls and Bridges, because of the Rock and Roll thing, I couldn't personally go down and deal with the commercial, but I did suggest to Chuck Braverman, who is a prizewinning film maker, that he use the cover that Capitol had produced of **Changing Faces** and **build** a commercial around my face by changing all the time, which is a pretty simple thing, and that he did.

I just discussed that over the phone.

Q When you say because of the Rock and Roll thing, you mean you had gone back to the studio to finish the Rock and Roll record?

A I was working again and it was just impossible to go to Los Angeles to make a TV commercial.

Q Was it your idea to do the animation on the cover, the switching back and forth?

A I told him to use the cover as it is. If you move the cover, then my face changes.

I said, "Use that and make the face change."

Q Can you describe for us --and I show you Defendants' Exhibit CB-4, what you mean by that?

mmbr 3 Lennon-direct

Demonstrate it to the Court, please.

A I think this is the same as I demonstrated when we made it. It is pretty simple to build the commercial.

Q Can you just describe it to the Court?

A To build the commercial around this cover, which is obvious if you move these things (demonstrating).

THE COURT: I remember it.

THE WITNESS: That is it.

THE COURT: What time period would this have been?

THE WITNESS: Well, I can only guess it must be when I went back in after having met Morris Levy.

MR. BERGEN: Walls and Bridges was released in about the middle of September, 1974?

THE WITNESS: I must have been doing something. I don't remember.

MR. BERGEN: The record shows that Mr. Lennon after the Walls and Bridges album was released went back into the studio in late September or early October, 1974, and started working on them.

THE COURT: He would not have been doing the commercials for Walls and Bridges in October, 1974?

THE WITNESS: I don't know.

THE COURT: In other words, you did not go and prsonally do the commercial, but you gave the ideas to Braverman?

THE WITNESS: Braverman wanted me out there, and I can't think of what was keeping me here, but I was doing some of the work, otherwise I would have done it and Braverman was quite disappointed I could not go and collaborate in the making of the commercial.

Q Can you tell the Court a little bit more who Chuck Braverman is?

A He is an award winning film maker who is famous for making the whole of American history in one minute. He made a movie like that, and it is used on Channel H a lot. It has been shown on the major networks. He shows the whole history of America in stills. I think he also did the whole history of western art in one minute. So he is quite good in making movies out of stills. Channel H uses the film a lot.

Q Do you insist on Mr. Braverman being used on your commercials?

A I prefer Braverman if I can get him, yes.

Q So that you asked Capitol to use Mr. Braverman?

A Capitol would not think of using Braverman unless I found him. They have their own people.

Q On the Walls and Bridges commercial, who did the voice toward the end of the commercial?

A That was Ringo and I. Ringo and I did some work for his commercial and for my commercial and for radio commercials and TV commercials,which I did on the West Coast. I don't remember which date. When I sold his album and he sold mine, we sort of had a friendly banter about, "Don't buy his, buy mine." That was used on radio and was used on television.

Q Tell us what role you played in the Rock and Roll commercial?

A Less than I did in the other two. This time Braverman really said, you know, he said through Tony King, "Let's get together and make this commercial." So I already had this idea of making a parody of the Chubby Checker commercial.

THE COURT: Go a little more slowly. What was your idea?

THE WITNESS: My idea of the commercial for the Rock and Roll was a parody of the Chubby Checker TV commercial, he being a rock and roll singer in the early '60s, and it was on so many times over the last five years, it became a joke. Everybody knows the commercial. There was one other commercial that was famous, the 7-Up

mmbr 6 Lennon-direct

commercial in that period where a guy with greaed hair and a leather jacket said says, "Do you remember when?"

And then they go back to the '50s, where there was no 7-Up and only Coco-Cola.

So I had this idea of combining both of these commercials somehow. The Chubby Checker one had people dancing in '50s clothes; the 7-Up had a guy with greased hair and a leather jacket, and he turns around very corny and says, "Hi,remember me," he says.

THE COURT: That was the 7-Up commercial?

THE WITNESS: Yes, it was a sort of classic commercial, and I was going to do, "Hi, remember me," as if I was already dead and gone. Then I told Braverman about it, either I or through Tony King, and Braverman got excited and sent back a whole pile of images that he had about a juke box and how you had this '50 car,a Cadillac, and he was going to make the whole set, and I was to go to the West Coast to play the lead in the Commercial, and Ringo and two friends, Ringo Starr and a few other friends from the business were going to all gather in the background and be the dancers, without being announced they were famous people, just in the back of the commercial, these people would be dancing and there would be Harry Nilsson and Ringo Starr and a few friends from the business, but that never

happened. So I had to tell Chuck that I can't come down to do it and he is going to have to use his rather inventive head again and make something, a still picture of that.

MR. SCHURTMAN: Your Honor, it is a waste of time for me to objection, But shall we just sit here for hour after hour hearing this narrative again?

How am I supposed to cross examine a man when he just talks and talks about his ideas?

THE COURT: It is not a waste of time to object.

MR. SCHURTMAN: I apologize, your Honor, because the last time I tried to when Mr. Lennon testified, my objections were overruled summarily and perhaps properly.

All I am saying, this witness has a habit of just giving long narrative dissertions and there is no way I can cross examine him.

THE COURT: Take notes.

MR. SCHURTMAN: I am.

THE COURT: There is no problem, and as far as the relevance, he is describing what he had planned to do on his commercial. I don't know how anything could be more relevant to what his claim is. You have every opportunity to cross examine him on his testimony, and, indeed, you are getting daily copy, which makes it doubly easy.

Q What was the reason that you couldn't do this

commercial the way you had planned?

A Because Morris came out with his album and Capitol said,"Let's go ahead." There was no time. They certainly wanted to put the album out, and so they put it out and there was no time to make a decent commercial or a better one.

THE COURT: You saw the commercial the other day. I don't remember it wellknow. That is the contrast between that and what you had planned?

THE WITNESS: Well, Braverman used it in cartoon form, and it is like the Walls and Bridges form, where he used only still pictures, and I do recall a kind of cartoon figure that flies to it in the Cadillac. So we used the images that we talked about, but there was no live second settting. In the first he had a live human body, and the second was purely graphic,and Braverman had made a point of wanting live bodies, and he did Walls and Bridges as a favor to me. And that was the difference. I forget even the question.

MR. SCHURTMAN: I object to what Braverman wanted as pure hearsay.

THE COURT: Overruled.

Q In other words, the Rock and Roll commercial, instead of being live, was animation?

A He had to use stills again, like a still picture of the album cover, and I recall there his carton figure in it. and for the short space of time you had to make it, it was a attractive commercial, but it could have been msuch more interesting.

Q Do you recall, Mr. Lennon,in the Rock and Roll commercial that there were animated figures, like Superman and The Lone Ranger and things like that from the '50s?

A Yes, sir, i remember the Long Ranger on a horse. I don't remember Superman.

Q Have you ever listened to the Roots album?

A No.

Q Do you have to listen to it to know what is wrong with it?

A No.

Q Can you tell us why --

MR. SCHURTMAN: Your Honor, this was all coveredat the first trial. We had hours of testimony on that point.

THE COURT: We really don't need this.

MR. BERGEN: I want to clarify why he didn't have to listen to it.

THE WITNESS: I can say it quickly: (A) No matter what anybody says, the 7-1/2 is not a 15, and the quality

is different, and it is a fact of life: and (B) They have two tracks on it that are terrible and they are harmful for me to have them on it, and the order is wrong, which I said in the previous trial, which is like putting out a Boston opening on Broadway. The show was not ready to go on the road, and they put it on the road and it is just ugly rehash -- "rehash" is the wrong word.

But I know what is on it. "Angel Baby" is out of tune and "Be My Baby" sounded warped, and that is the reason I took them offfinally. And I did alterations to "You Can't Catch Me" and "Do You Want to Dance", and many little things that I could go on enumerating about the Roots album, which I know are on it without listening to it.

THE COURT: Everybody has been reluctant to have me hear music.

MR. BERGEN: Mr. Marsh from Rolling Stone Magazine will go through both albums.

THE COURT: Is the audio equipment working?

MR. BERGEN: Yes. The reason it was not working yesterday is this is a very delicate turntable and the band that helps drive it just slipped a little bit. That caused the banging.

Q I show you a document that has been marked as

Defendants' Exhibit DO for identification. I ask you if you have ever seen these reviews?

A I might have seen them. I don't remember. All reviews are sent via some clipping service. I can't honestly say I remember. There are so many of them.

MR. BERGEN: Your Honor, I offer these four reviews of the Rock and Roll album.

THE COURT: Is there any objection?

MR. SCHURTMAN: I have not seen them.

MR. BERGEN: I have only one copy.

MR. SCHURTMAN: They don't indicate from what publication.

MR. BERGEN: One is from the Lincoln, Nebraska Journal; the second one doesn't say; the third one doesn't say; the fourth is from Concert Magazine. I don't see what difference it makes where they are from; we didn't make them up.

MR. SCHURTMAN: It makes a big difference. I object unless you, at least, identify the source.

THE COURT: I really don't see how I can receive these unless they have some evidence of publication.

MR. BERGEN: Two of them do.

THE COURT: Two of them don't. I accept the ones that show the source.

mmbr 12 Lennon-direct

MR. SCHURTMAN: The ones that do have an indication, I will accept Lincoln, Nebraska, but the other one, what is it, Concert Magzine?

MR. BERGEN: Yes.

MR. SCHURTMAN: I would like to have somebody tell me what Concert Magazine is.

THE COURT: That is very easy to come by.

MR. SCHURTMAN: Let us get it.

MR. BERGEN: The objection they are all favorable reviews?

MR. SCHURTMAN: Stop being silly, Mr. Bergen.

MR. BERGEN: I offer them.

THE COURT: I will take the two that are identified, Lincoln, Nebraska and Concert Magazine.

MR. SCHURTMAN: Subject to what Concert Magazine is.

THE COURT: What evidence is there?

MR. BERGEN: We will try to check where Concert Magazine is and we will try to verify the other two reviews.

(Defendants' Exhibit DO was received in evidence.)

BY MR. BERGEN:

Q Mr. Lennon, do you feel that your reputation

as an artist has been damaged by the Roots album?

A Yes.

Q Can you tell us why?

A Firstly, because it came out in such a hurry that there was no preparation for the marketing of the commercial.

THE COURT: He is asking you about the Roots album.

THE WITNESS: That damaged me by making my own album have to come out too quickly. It came out on the tail of Walls and Bridges, which had only been out four or five months, and generally I leave a nine or twelve month period between albums, and albums do go on selling for longer than four or five months. It just made me look bad.

The commercial Levy put on TV was atrocious and ugly and cheap. It made me look cheap. The album itself they put out made me look cheap by its content, by putting out stuff that I would never put out, two tracks especially.

Q You are referring to Angel Baby and Be My Baby?

A Yes. It confused the public's mind, was the main thing.

MR. SCHURTMAN: I object. This witness is not

qualified to tell us how the public was confused.

THE WITNESS: I am. I met the public, who talked to me about my product. I met a taxidriver who said, "Sorry, I already bought the wrong one." That is the public. They talk to me on the street. I know what they are thinking. I don't live in some ivory tower. I walk the streets. I get in taxicabs and I know what they think.

THE COURT: I won't accept any more evidence on this point.

Let us go back. What did you experience or hear?

THE WITNESS: Well, people were confused as to (a) What I was doing on a TV commercial and (b) When the Capitol album came out they didn't know which was which and it just was confusing to have two products out. It is like having two shows opening at the same time, somebody is opening up with a rough print of the movie in the Village, and the main movie is trying to be shown uptown, they are advertising both movies, and people don't know whichmovie to go to; they don'tknow they are getting a lousy print. They think because it has my name on it I endorsed it.

I don't know how else to say it. They were confused by it, and the industry was confused. I think I looked like a fool in the industry, still do. I am still

being hailed into court, I am still being here: people say, "Are you still messing around with Morris Levy?" It is humiliation from the word "go" and it is not good for my career, especially since I am re-negotiating contracts.

MR. SCHURTMAN: At some point I have to interrupt. May I have a continuing objection so I don't have to keep popping up on grounds of hearsay and on grounds that this witness is not qualified to tell what the public thinks or what the industry thinks, not in the general way in which he is doing it.

THE COURT: You can cross examine him. I will allow the testimony.

Q Did you have any specific conversations with any member of the public about this confusion?

A I honestly remember one taxi driver talking to me after I had been on a radio program. Some members of the public rang up the radio studio and they were confused on it, WNEW, when I was promoting the Rock and Roll album on WNEW. I did not have time to do my usual promotion on the Rock and Roll album. I usually go to the West Coast and Capitol arranges for me to do certain interviews, either by telephone or in person with key members of the press, and where you do a whole promotion on an album you talk about the album to people and on radio, and there was

no time for all that.

Q You were going to say about the taxi driver?

A Well, he talked to me after I had been on WNEW.

He said, "I am sorry, John, I already bought the album, I already bought the other one," is what he told me.

Q Meaning the Roots album?

A Yes, he bought the Roots album. I said, "I am sorry myself." People shouted a few things at me as I walked by. I don't remember what they said.

am

Q Mr. Lennon, do you place great importance on the use of your name and picture and likeness?

A Inasmuch as that is what I earn my money with.

Q Have you ever endorsed any product other than your own products or records of The Beatles?

A As far as I remember, The Beatles and myself only ever promoted our own stuff.

Q And that was something that you had decided years ago to do?

A Well, Beatles got a lot of offers to endorse things and we never did. We still get offers now from Florida, some orange growers or something want to use a Beatles song to sell oranges. They want to use a song called "Good Day Sunshine." We won't let them use, prostitute the song to sell oranges, you know, and they approach us every year for the same song. They usually approach through the publishers and every year they get turned down.

Crazy things come in to use the name Apple which is the Beatles' other trade name which is our record company, to make Apple clothing, some people keep asking us to allow them to make Apple clothing, or Beatles this, and we just don't allow them to do it, and we don't use our name to sell toothpaste or haven't so far, and Coca-Cola

and Pepsi-Cola are after the Beatles for all of their career and we wouldn't -- they offered us a lot of money just to hold the Coke bottle and we wouldn't do it.

Q Have you recently received an offer to endorse some product yourself personally?

A Yes. Some Japanese guy or firm wrote to me saying they will give me $100,000 just to use my name. I have forgotten what the product was. It was either radios or clothing. I can't remember. I just wrote back saying that is enough for the tax man. I used an old joke. I said that is enough for the tax man-- what are you going to pay me? Because I wouldn't do it anyway.

MR. SCHURTMAN: Your Honor, I move to strike the last portion of the testimony unless we get details of the offer to see if it was a bona fide offer.

THE COURT: Well, he is generally saying he does not endorse other products. I don't think we have to get the details.

Q Was this all that you received from this Japanese company?

A Yes.

THE COURT: The point is he doesn't endorse other products and if anybody has any information to the contrary they can bring it out.

MR. BERGEN: What I am just trying to establish, your Honor, is that somebody has offered Mr. Lennon $100,000 for the use of his name and that he rejected it.

MR. SCHURTMAN: That is what I am objecting to. We have no way of telling whether this was a bona fide offer. I could tell Mr. Lennon I will pay him a million dollars. So what?

MR. BERGEN: Why is there any question if it is bona fide he got a letter?

MR. SCHURTMAN: Any crank can write to him and offer him a million dollars. If that is important --

THE COURT: All right, cross-examine.

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Mr.Lennon, were you consulted by either Mr.Menon or Mr. Coury on behalf of Capitol about Capitol's plans to rush the Rock and Roll album?

A How do you mean consulted?

Q Did they ask you whether they could or should rush out their own album?

A Well, it went rather like this. That I was to stand by. The record plant was to stand by to master the album and we just waited for a call and they didn't have to consult me. It was a matter of when it was going out.

They called me. We made the master and put it out.

Q Let's get the sequence straight.

January 28, you approved the final advertising promotion plans at the meeting at the Sherry-Netherland, right?

A If that was the date, right.

Q That was the date.

You then went back to the record plant to finish the editing of the master?

A But that -- excuse me, that meeting, you are talking about when Al Courty came into town with these proposals?

Q Yes, January 28.

A I approved them to start making it. I had to see it before I approved the final thing. I mean, all they had was drawings.

Q You then went into the record plant and finished the editing of your final master, the lacquer?

A Most likely, yes.

Q Now when did you first learn that Capitol was planning to rush out the Rock and Roll album, to expedite the release date?

A I honestly don't remember. The day I started

mastering it, which would either be that very day or they would have told me the day before and I would have booked it.

Q If it will help you, Mr. Lennon, Mr. Bhasker Menon testified that he didn't make the decision to rush the album until February 7, which was two days after you had delivered your final master.

Does that refresh your recollectionof when you first heard that the album would be rushed?

MR. BERGEN: Your Honor, I object to the form of the question. The final master was delivered on the 6th.

MR. SCHURTMAN: On the 5th.

THE COURT: I thought that we had established before that he was working on the lacquer master around February 4 or 5.

MR. BERGEN: That is correct.

Q And he finished it on the 5th?

MR. BERGEN: And it was delivered on the 6th.

THE COURT: Your question relates to the making of the lacquer master, is that right?

Q Right. My question relates to when did he first learn that Capitol had decided to rush out the album.

A I don't remember.

Q Did they ask you, did somebody come to you and say, in words or substance, "Listen, Mr. Lennon, this fellow Levy is putting out his album and we have decided we have got to meet his competition, we want to rush out the album"?

Do you agree or do you disagree or do you have any views on it?

Do you remember such a conversation?

A There was no conversation like that because it was understood that they would have to -- that the album was going to go out sooner because of Morris, his album.

Q Yousay it was understood.

How was it understood?

A I don't know. But when they called me -- I can't even remember who called me -- just to say, "Go ahead, make the master"; it was just--- I don't know how I understood it, you know. I can't remember. But there was no business discussion about it. It was like obvious, that it had to go out.

Q Are you telling us that a deicsion was made to rush out the album even before you made the master?

A I am saying that I only recall getting the green light to go in and make the master around the time that I went in and made the master.

Q And in that connection,did somebody tell you, "John, you have to make that master in a hurry because we have to compete against Levy's album"?

A Nobody used those words. It was, "We are going ahead," and I knew why we were going ahead. I don't know whether they said-- I don't know whether they gave me any detail. They wouldn't have to. I knew what was going on.

Q Did anyone tell you, Mr. Lennon, in words or substance, that Capitol would have to expedite the release date of the Rock and Roll album, that it would have to eliminate or expedite certain advertising in order to meet Levy's competition?

A No, I don't recall people talking like that. The commercial had to be cancelled, I remember that.

Q Fine.

A And I probably had to call Tony King and say we can't do the commercial, it is going out in so and so time. I don't really remember and you are asking me to remember something I don't think happened.

Q It didn't happen? Fine.

Let's see if we can pinpoint one date at least. When did somebody tell you or when did you tell somebody that the commercialwould have to be cancelled or not done the way you wanted it done.

A I really can't tell you. I don't know. It all seems like around the same period, just before the mastering or around about that time.

Q Did anyone come to you and consult you whether the price should be cut from a suggested retail price of $6.98 to $5.98?

A They never discussed the price with me. I have never heard anything about price, ever. I did hear that they were going to put it out cheaper.

Q But nobody consulted you?

A They may have. I just don't recall it. If they think that is what prices should be, who am I to argue? I don't know anything about the price.

Q I see.

Incidentally, there has been testimony that the recording costs of some $240,000 --

A Yes --

Q -- were initially paid by Capitol, which was then reimbursed by EMI.

Do you know whether EMI charges you for these recording costs?

A I think as far as I know, under the European style of recording costs, the company eats up the cost; whereas in America, you have to pay for your own sessions. So I

think they just pay for it.

Q Well, do they charge you with any portion of these recording costs?

A I don't know.

MR. BERGEN: There has been testimony that they don't in the trial, that the recording costs are not re-couperable.

A As far as I know, EMI always paid for them and never took anything back, because Americans are saying in our country the company takes the money off you right away, of our royalties. I don't think they take money from me, no, they pay for the record, but they keep it, they own it.

Q Do they deduct it from your royalties?

A No, not as far as I know.

THE COURT: All right. Let's recess until 2:30.

(Luncheon recess)

AFTERNOON SESSION

2:30 p.m.

THE COURT: OK, Mr. Schurtman.

J O H N L E N N O N, resumed:

CROSS-EXAMINATION(continued)

BY MR. SCHURTMAN:

Q Mr. Lennon, with respect to the Rock and Roll TV commercial that was prepared by Capitol, aside from the fact that it may not have been what you would have liked it to be, was there anything wrong with it?

A I think it suffered from being hurried, yes.

Q From what?

A From being, I think it suffered from being hurried.

Q In what respects did it suffer, Mr. Lennon?

A It seemed to me that it had holes in it.

Q What holes?

A It seemed to move along and there would seem to be lack of -- like there was nothing happening in parts of it, waste of space, you know. For a TV commercial, there wasn't enough impact I didn't think. It was like it was strung together by those cartoons. It starts off with a picture of the album cover, I believe, and then it goes into the cartoons and it gets a bit wishy-washy in the middle,

it doesn't really punch home.

I think he did a pretty good job considering the time he had.

Q Actually, the commercial showed some old Beatle scenes, didn't it?

A The bit I remember is the cartoon, actually. You would have to play it again. I don't remember Beatle scenes. It might have shown me in younger life, if that is what you mean, by Beatle scenes. I don't remember the other Beatles being in it.

Q It showed you in younger life, didn't it?

A Yes.

Q What about the Roots commercial, did you ever see that?

A Yes, a couple of times.

Q What are your objections to the Roots commercial, if any?

A Mainly --

MR. BERGEN: Your Honor, I object. I think he has testified in great detail about what his objections are. And I think Mr. Schurtman cross-examined him on this on the original trial.

MR. SCHURTMAN: The Roots commercial? Why don't you show me the page number?

THE COURT: Give it again.

A Well, they used that what I consider dreadful cover from the Roots thing. That is the main thing I remember about seeing it first.

Q What else?

A And then on the other pictures they selected I did not think they were too favorable to me and it was too -- it was obvious Morris Levy didn't have much time to make that either. And itwas pretty fast made and it looks like it. And it is cheap-looking and it has nothing different about it from any other tinpot selling oldies but goldies, on TV.

It had no inventiveness. It was no different from any of those other commercials they put out on night and day.

And I try to make my commercials stand out a little.

MR. SCHURTMAN: Your Honor, we have had some general testimony about the Roots commercial. I would like to play it again and stop certain scenes and question Mr. Lennon about them.

THE COURT: OK.

THE WITNESS: You want me to come over there?

(Commercial played)

Q Mr. Lennon, you have just had an opportunity to see the two Roots commercials which were played to you in the courtroom.

You have already told us you did not like the reproduction of the album cover?

A Yes.

Q Can you point to any specific images that appeared on these commercials? These commercials showed pictures of you in your younger days, I assume?

A Yes.

Q Are there any specific pictures that you object to and if so which ones are they, and on what grounds?

A Well, all of the pictures used I would not use to sell. I wouldn't pick any of them. If I was going to pick those pictures to represent me, I would have written them all off.

Q Did you think any of these pictures were demeaning?

A Yes. They are not good pictures of me; that's all.

Q Which ones?

A I mean if I have pictures of myself going out, I would like to have nice pictures. It is part of the music business. It is called your image.

Q All right.

Let me show you Plaintiff's Exhibit 228, which is Unfinished Music No. 2, Life with the Lions.

There is a picture on the cover of that album. Did you personally select that picture?

A I selected it and chose it.

Q Did you regard the picture as an image that you wanted to convey to the public?

A Yes, I chose it.

Q What does this picture represent?

A It represent Yoko and I coming out of court in England.

Q Does it represent your arrest?

A No. It represents, I just told you what it represents. We are walking out of the court. I was surrounded by fans and these cops are guarding us from the kids.

Q Is that what the picture shows?

A Yes. It was in the newspapers in England.

Q It has nothing to do with an arrest and the conviction?

MR. BERGEN: That is not what he said at all.

MR. SCHURTMAN: I am asking him.

MR. BERGEN: Why don't you listen to what he says?

Q All right.

THE WITNESS: I still can't compare them.

MR. BERGEN: You asked him if it has anything to do.

Everybody knows about the arrest. The conviction has been wiped out. Are you familiar with that?

MR. SCHURTMAN: Are you testifying, because I would love to put you on the stand once and for all, Mr. Bergen.

THE COURT: Let's go.

Q Let me show you Defendant's Exhibit 4M for identification.

Have you ever seen this before?

A This one I haven't seen, no. It looks like another version of that. They are press photographs.

Q It is a photograph from Rolling Stone for November 23, 1968. And I suggest to you that this picture was taken at the same time as your album cover.

A So? I got this from a pressman. I told you. That is a press photograph and I requested a copy from a paper in England. Now maybe that is the same day.

Q Yes, it is the same day and the picture was published in connection with an article which stated "John Lennon and his girl friend Yoko Ono were busted for grass on October 18, in London, rousted out of their flat

by police and police dogs, taken on July..." --

MR. Mc HUGH: I object.

THE WITNESS: We were never in jail.

MR. SCHURTMAN: Your Honor, the reason I am offering this is I am not concerned about Mr. Lennon's conviction or whether it was wiped out. That is not my concern at all.

My only point is that when Mr. Lennon decided to present a picture, to present his image to the public, the picture that he chose to present is a picture of him being arrested.

THE WITNESS: That is not the picture I chose. That is a different picture, see?

Q It is the same scene.

A That's the difference between Mona Lisa smiling and Mona Lisa not smiling.

MR. SCHURTMAN: I respectfully offer Defendant's Exhibit 4M.

THE COURT: Any objection?

THE WITNESS: It is telling --

MR. BERGEN: That's the whole point. It is Mr. Lennon who selects the picture and Mr. Lennon did not select the picture.

THE COURT: Whatever the point I will receive the

the picture.

(Defendant's Exhibit 4M received in evidence)

Q Incidentally, as long as we are talking about Plaintiff's Exhibit 228, Life with the Lions, did you regard the pictures on both sides of the cover as somewhat fuzzy? They are blown-up photographs, aren't they?

A I chose them because they are of the period and about what is inside the record. You see, they have a relationship with what is inside the record.

MR. SCHURTMAN: Your Honor, I request that the witness answer my question. I asked him a specific question.

If you say they are not fuzzy, say "Fine, they are not fuzzy."

A This one is a little fuzzy, this one is not fuzzy.

Q You say the one on the back is a little fuzzy?

A No, this is the front. The cover is in color. This is the back. The back is the picture with the police. This is the cover.

Q All right.

A OK?

Q Thank you for explaining that.

A I didn't like the writing on the cover.

MR. SCHURTMAN: Would your Honor want to see a

picture that is a bit fuzzy. It is an Instamatic picture. The cover of Imagine is also an Instamatic. That's fuzzy, too.

I often use Polaroids and Instamatics.

Q Mr. Lennon, you consider yourself personally responsible for every product that has your name on it?

A I would like to control everything that has my name to it, yes.

Q And you take responsibility for everything that goes out with your name on it?

A I cannot because my name is used without my permission vis-a-vis this week there is a big article in People Magazine that I didn't give them permission, and they are quoting me and I didn't even talk to them.

Q I am talking about products that are released with your permission and authorization. You consider yourself fully responsible for those, don't you?

A I like to be responsible for whatever goes out with my name on it.

Q And do you feel that everything that goes out with your name on it, if it is done with your consent, has an impact on your reputation, one way or another?

A I don't generally consider it unless it is a bad impact, you know.

Like when I made, for instance, the Imagine cover or when it was presented to me, I will use that just as an example. I didn't think "This is going to be good for me" I just knew it wasn't going to harm me.

(continued on next page)

pm

Q Now, when you put out something with your name on it -- let me be specific -- when you put out an album with your name on it, do you assume the people who see the album, your fans, will expect that it will have Lennon performances in it?

A It depends. Give me a specific.

Q I will give you a specific. Take the album that the Court has, Plaintiffs' Exhibit 228, Unfinished Music No. 2, Life With The Lions, when you put that album out did you assume that your fans would assume that this had your performances on it?

A Yes, this was a follow-up to Two Virgins, which is Unfinished Music No. 1, and it went on a Zapa label.

Q Howwould anybody know?

A Because it was stated in the trade papers what it was. Zapa always put out avant-garde music by a guy called John Tavener and Zapa was avant-garde.

Q If I were a customer in the United States and if I were a fan of yours and familiar with your work as a Beatle and so on, if I were to go into a store and see a Lennon album, would I be entitled to assume that this is Lennon's music on it if it doesn't say anything to the contrary on the cover?

A You would be entitled to assume that it is a

Lennon record. My fans know me well. They know they are liable to get anything from bag-pipes to rock and roll.

Q Sometimes they don't know until they go home and play it?

A My fans are not stupid: they would make sure they knew what they were getting.

Q How would your fans know?

A Most rock and roll albums have a listing of the tracks on it, and all they have to do is play it in the shop. That is what I used to do. I never went home without playing them.

THE COURT: What kind of music was in the Two Virgins album?

THE WITNESS: Avant-garde.

Q Do you sing with Ono Yoko?

A We are not singing; it is completely avant-garde. There is a live performance of Yoko, and it is just me on the guitar playing.

THE COURT: The Two Virgins --

THE WITNESS: That is avant-garde.

THE COURT: With you and Yoko on it?

THE WITNESS: Yes.

Q Now, incidentally,do you know how many copies of Two Virgins sold in the United States? That is the

figure we were missing yesterday.

A I have no idea. I know Tetragramaton put it out. I have never inquired about it because it was blown selling. The sales were blown by Capitol, and by the time they decided, everybody had a cover.

Q It was a highly controversial album?

A It depends. Yes.

Q Did people rush out to buy it because it was controversial?

A I don't know whether they rushed out to buy it, and everybody was talking about it, and if it was not for the record company, I would have had it in the shops, instead of being wishy-washy about it, but they didn't, and it didn't sell that well, but it certainly got the idea across.

Q Did you think the fact that Two Virgins didn't sell well, if that is the case --

A Well, it sold as well as Alan Ginsburg or Stockhousen or John Cage, who sell 15,000; these sold about 20 or 30,000, and that you can only compare with other avant-garde works: you cannot compare it with Imagine.

Q Let us talk about Imagine, since that was your big hit.

A So far.

Q I have not seen any others. I show you Defendants' Exhibit CB-5. Where does Imagine set forth the tracks on it in the outside cover?

A Capitol came and had words with me, and I would not have anything on the cover, and then they allowed me to do it for this, and apparently the next one has it, because they talked me into doing it. Capitol said, "If you have the name of the songs on it, when the kids look through it they can see which songs you are going to sing."

Q But Imagine didn't have any names on the cover?

A I don't want them on the cover. You know, I put them on th back, and that is at Capitol's request. They said the kids like to read, because it is my policy not to do it.

Q You said that one way that your fans learned what is on an album is by looking at the tracks on the cover. Now, my only point to you is that your big selling album doesn't have any tracks on the cover. So how would your fans have known that Imagine was a characteristic Lennon album?

A Most likely Imagine is written on the cover underneath this writing and Imagine was already a hit song when that album went out.

Q Would you say that your face on Imagine is somewhat fuzzy?

A It issupposed to be somewhat impressionistic, in the clouds.

Q It is supposed to be fuzzy and it is fuzzy?

A Yes. Some are like impressionistic paintings.

Q So far we have been talking about your avant-garde Two Virgins and The Lions.

What would you say the Wedding album was? You approved that going out?

A Of course, I did. They would never have gone out otherwise.

Q Does that contain any music?

A There is a little singing on it, but I would term it an avant-garde to differentiate it from the other ones. That is another documentary.

Q Would one of your fans know what is in it by just looking at the outside cover?

A They would have to look inside the box. I think it is pretty obvious what it is. It is a wedding album, only we made ours public, instead of keeping it in the house.

Q Couldn't it have been music?

A Rock and Roll?

Q Any kind of music.

A I think Yoko sings.

Q If kids go into a music store and buy this album, do they first have to listen to it in the music store to discover what it is?

A That would be better, otherwise that would have sold as well as Imagine.

Q I don't know.

A That probably sold 50,000. Kids would want to have that as a souvenir.

Q Based on your talks with taxicab drivers and elevator operators and what have you, is it your understanding that there is a lot of word advertising among kids, that kids tell each other what they like and what they don't like?

A I would presume that they do.

Q Now, if you open up the album that is the Wedding Album, CB-6, there's a big picture in the album showing you and Yoko in bed surrounded by reporters?

A Yes.

Q What image were you trying to convey to your public?

A You can see what is over the bed, Peace and Love.

Q Did you get any adverse reactions to this

album?

A The album? I don't remember. I don't think so.

Q The picture?

A No, the picture was great.

Q You never heard a single adverse reaction to this album?

A No, I don't see why anybody would be annoyed by the album.

Q Did you ever hear any adverse reaction to Two Virgins?

MR. BERGEN: We were all through this at the trial.

A I don't think you will find any adverse reactions.

MR. SCHURTMAN: At the trial I offered all the adverse reviews of the Two Virgins and you asked me to wait to this phase of the trial. I would like to mark them in evidence with your Honor's permission, Plaintiffs' 4-A to 4-J. I would characterize them as very critical reviews of the Two Virgins album.

THE COURT: Does the law support that?

MR. SCHURTMAN: The law in this circuit and the United States Supreme Court is when a man is claiming damage to his reputation, which I gather is the issue we are

on now, the manputs his entire reputation on the line, and the Court is supposed to look to see in what manner his reputation has been hurt. If the man has done things, either voluntarily or involuntarily, which have damaged his reputation in the public, and I think these reviews show that Mr. Lennon's reputation was badly tarnished, that is one of the items of evidence the Court has to consider before deciding whether to give him a penny for his alleqedly hurt reputation.

THE COURT: I will take it. But if you come to grips with this -- you will hear me more -- Mr. Lennon obviously has certain objectives in his artistic productions, and sometimes it takes the form of the Two Virgins album, sometimes it takes the form of an Imagine album. But he is able, presumably, to decide what he will do at a given time, whether it is avant-garde or regular rock music, and this all over the years, I assume, builds a cumulative reputation.

But, at least, it is within his control to some extent, and he is able to decide whether he does avant-garde or a nude album or whatever.

MR. SCHURTMAN: We are past that issue.

THE COURT: Then the problem is when someone else puts out an album, maybe it is in someone's eyes more

respectable than the Two Virgins, but that really isn't the point. It is not his doing. A John Cage might not put out the same kind of music that Victor Herbert would, but that is John Cage's business.

MR. SCHURTMAN: Let me address myself to that issue, because your Honor has raised it a number of times. There are two separate aspects to the case. One was whether Roots was put out with Mr. Lennon's consent or not. You have ruled in your first decision that it was put out without his consent; he did not authorize it. Fine. We have passed that issue, at least as far as this trial is concerned.

The next question is, how was he damaged? Now, that is not a question of his consent or lack of consent. That is a question of how was he damaged in the eyes of the public.

THE COURT: You are not getting my point. You can have an artist who may e a John Cage. He is determined to be avant-garde, somewhat outrageous. Now, somebody puts out an album of Victor Herbert and says it is John Cage. Then it may be a lot more respectable, a lot more, maybe millions of people would like it better than John Cage, but that would damage John Cage, because John Cage does not want to be the kind of a middle of the road, have a middle America effect. So you can't come in and say,

"Gee, John, you were imporved by this," because that is not John Cage's objective.

MR. SCHURTMAN: If this were an injunction case you would be absolutely right on that point.

THE COURT: I think it is just as true in damages. The problem is to come to grips with what was Mr. Lennon's objective as to what he was trying to convey to the public and match that against the image conveyed by the Roots album and the Roots commercial and see where there are differences and try in some mysterious way to put a dollar value on it.

MR. SCHURTMAN: I respectfully disagree with your Honor. If you are talking to damages, if mental anguish, yes, whatever it was in Mr. Lennon's mind, the law does not entitle him to damages for his mental anguish. If you are talking about compensatory damages, the question is not how he has been damaged in his own eyes, but in the eyes of the public at large. That is the issue before your Honor. It has nothing to do with Mr. Lennon's objectives. That is no longer the issue. That may have been the issue in the first trial.

THE COURT: You are just telling me that, but I don't agree with you.

MR. SCHURTMAN: I appreciate the fact you

don't agree.

THE COURT: You can put in all that stuff about Two Virgins, but how it is going to cut, I don't know, really, in the long run.

MR. SCHURTMAN: Judge, I hope to be able to persuade you at some point with appropriate citations of authority that the issue before you is not what it was in Mr. Lennon's mind, but how the public was affected by this.

Now, I have to put in the evidence, because if I can succeed in persuading you, fine, but if you award damages on a different basis, perhaps I can persuade somebody else.

But I have to put in my evidence to support my theory of the case.

THE COURT: Put it in.

MR. BERGEN: May I have an objection for the record.

(Plaintiffs' Exhibits 4-A through 4-J, inclusive, received in evidence.)

Q Mr. Lennon, I show you Plaintiffs' Exhibit 229, Live Peace in Toronto, 1969. Does this album contain rock music?

A Yes, partly.

The first side was straight rock and roll, the second side was avant-garde.

Q I assume that those of your fans who bought it bought it in part for the purpose of listening to your rock music?

A Yes.

Q Your performance of rock music in Toronto?

A Rock and avant-garde.

Q Was the rock your own music or somebody else's?

A Part mine and part was classic rock.

Q Would you agree that every album that you put out has an impact on your next few albums?

A I have been told that by the record companies. It was hard for me to accept at first.

Q Is this something you have given any consideration to when you put out an album?

A I certainly did not think about it at first, but I think about it now because I know it affects the next album.

Q Since this trial?

A No, over the years I have learned the fact that one record can effect you for a couple of years after, which I never knew.

Q Now, Some Time in New York City, that came out

over your name, did it not?

A Sure.

Q And you assumed full responsibility for it?

A Of course..

Q Whether it did well or badly, it is your responsibility?

A I put my name on it, of course.

pm

Q And if it did badly?

A That's too bad.

Q That's too bad?

A Yes. I can't help that.

Q And in your view does that affect your reputation as a performer in the eyes of the public when something comes out that the public doesn't like?

A Well, my attitude is that if I don't like one, that's too bad: I'll make another, and if they like that, they like it. I can only do the best I can at a given time.

Q I think yesterday we made a distinction between, if I use the right terms, characteristic Lennon albums and non-characteristic Lennon albums, and I think we all agreed that Imagine, Mind Games and Walls and Bridges were characteristic Lennon albums.

A Yes.

Q That Shaved Fish contained your characteristic songs?

A Yes.

Q Now, what about Rock and Roll, would you regard that as a characteristic Lennon album?

A It is a step out of character, really.

Q It is out of character, isn't it?

A I am known for rock and roll singing. Even in The Beatles, I was known to do, you know, a lot of rock and roll. But it is uncharacteristic inasmuch as I didn't write them.

THE COURT: I didn't understand that.

THE WITNESS: I didn't write the songs; so in that way it is uncharacteristic but, on the other hand, I have been known to do rock and roll before that I hadn't written.

Like Live Peace in Toronto, so it is not characteristic but--

Q It is not?

A Not quite, but a little. I am known to do that. Live Peace in Toronto has rock and roll on it so in that respect it is slightly characteristic but I normally write them myself.

Q Well, you are also known to do avant garde?

A Yes.

Q So does that make it characteristic Lennon because youare known to do avant garde?

A No. It is characteristic for me to be a bit oddball, that is the best way of doing it.

Q All right, I subscribe to that.

A I can't, you know, there is no set pattern.

People seem to think that if I write it, then it is more characteristic.

Q Mr. Lennon, is it possible that the kids who are fans of yours and who like albums such as Imagine, Walls and Bridges, Mind Games, they like the stuff you write?

A Yes.

Q And that you play your own compositions, that they may not be that interested in hearing you sing a bunch of old rock and roll tunes that somebody else wrote?

A Well --

Q Is that possible?

A It is possible but I doubt it.

Q Why?

A Because some of the Beatles' biggest hits, although we are famous for writing our own songs, were songs, old rock and roll songs. And the Live Peace in Toronto album did rather well because of the old rock and roll songs, I suspect. Because it was a rock and roll revival in Toronto that I was performing at and they love it.

THE COURT: Well, wait a minute. The Toronto --

THE WITNESS: Was a rock and roll revival. They even had the original artists there like Little Richard

and all these people we have been talking about in this trial.

THE COURT: When was that?

THE WITNESS: In 1969, and it was a revival and they asked me to go because they knew I am a particular rock and roll sort of freak. They know I like that period particularly and they invited me to go and I went and performed but I also did some wild stuff as well.

THE COURT: Well now, just on the record, the songs that you sing --

THE WITNESS: On the Live Peace in Toronto, two or three of them are old rock and roll because it was supposed to be a rock and roll revival, but I did a brand new number I had just written which they had not heard before.

THE COURT: I will be interested in hearing the rock and roll this afternoon but the character of the music is somewhat different?

THE WITNESS: On the Live Peace in Toronto.

THE COURT: Well, wait a moment. The music that you wrote yourself, for Walls and Bridges --

THE WITNESS: Yes.

THE COURT: And Imagine is somewhat different, is it not, than the rock and roll on the Rock and Roll album?

THE WITNESS: Yes because the rock-- the old

50's rock and roll is of that period. They never had good lyrics then even if you wanted to have it. So my stuff is completely different because 10 or 15 years later -

THE COURT: Well, it is probably hard to put in words but there is a difference, even the melody, the harmony, whatever you want to call it, you would say it is distinct?

THE WITNESS: It is distinct, but I lean heavily on that period even for my own writing and some of my stuff sounds like that period. I am not completely divorced from that period even now. I still utilize the basic 12-bar now and then, or the basic rock and roll rhythm.

Q Can you make --

A But my lyrics are a different ball game from those days. But the music is not that far advanced from the 1950's. Any of the music that is going on today.

Q Mr. Lennon, can you name some of the cuts on Imagine--

A Yes.

Q -- that you would say are of the same type, the same beat, the same rhythm?

As rock and roll?

Q As rock and roll.

A Crippled Inside, track two is direct -- imitation isn't the word -- it is a direct feeling of the early Sun records which are classic rock and roll records made with the original recordings of Elvis Presley, Jerry Lee Lewis, Roy Orbison and Carl Perkins and some of the great classic rock and rollers where all on one label called Sun and I can't remember offhand the name of the producer who is a world-famous producer. That sound was famous throughout the world when I was 15, and I utilize it on the Imagine album on the second track called Cripped Inside.

Q And is that the same sound, the same type of sound that you have on rock and roll?

A There might-- I don't say there is a track, it is the same period.

Q I know. The period had a lot of things in it.

Is it the same type of sound because --

A I don't think I did a song kind of song-- I don't think I did a Presley kind of record on the rock and roll album; just due to space, there was no space.

Q How many old-style rock and roll songs did you have in Imagine? How many of the cuts--

A Well, --

Q -- were 50's type rock?

A Crippled Inside was one. There is I think a thing called I don't Want To Be A Soldier. If I have got the right album. That is in that style.

Q Any others?

A That's the only one I can think of offhand.

Q How about Walls and Bridges?

A Walls and Bridges?

Q Can you name any cuts on Walls and Bridges?

A Whatever Gets You Through The Night, which is the hit single from it.

Q You say that's '50's type rock and roll?

A That could have been written in the '50's. If you play it you can hear it, it sounds just like those days.

Q Any others?

A I have to look at the tracks.

Q Sure, look at them because what we are trying to establish, Mr. Lennon --

A I know.

Q You have testified that rock and roll is not quite characteristic Lennon because you didn't write the songs. Now I am trying to find out in the other albums that we all agree are characteristic Lennon, such as Mind Games, Walls and Bridges, Shaved Fish and Imagine, I am picking those four examples.

A Yes.

Q I am trying to find out the similarities and the differences because that may explain the difference in sales.

A All the music I make is based mainly in that period. That was the biggest influence on my life. So when I tend to write a fast number, it tends to be of that '50's period, although I utilize all the things I have learned since the '50's and all the new kind of nuances that have been introduced into pop music, but my basic training, my trade, was in rock and roll.

THE COURT: Isn't there -- look --

THE WITNESS: It just so happens, your Honor, I started out imitating American music and then I learned how to write it myself and then it became my own music. But it is still based on that music.

THE COURT: But based upon-- the thing is, to me in listening, during this case, there is a characteristic quality of the music you write, correct?

THE WITNESS: Yes, it has my touch on it.

THE COURT: Something I guess it would be hard to put in words. If we can hear it, OK. Whether it is fast or slow, there is something about the harmony or melody and the lyrics and --

THE WITNESS: Yes, and the way it is produced, the sound.

THE COURT: Now if you are doing the songs and lyrics of whoever these other people are, Chuck Berry, somebody, now that for better or worse is going to be somewhat different, it is not the same as yours?

THE WITNESS: No, no, no.

THE COURT: It may have the same basic style or whatever, but it is not yours?

THE WITNESS: No.

THE COURT: Now, anybody, it seems to me, and certainly even I listening will say, well, this is different from John Lennon, right?

THE WITNESS: Yes.

THE COURT: Now, I guess one of the things we are trying to get at, and I don't know how to find out is this: If your fans have grown to enjoy your characteristic music, and buy those records, then you come along and you record an album which is maybe very fine, but is different; now, isn't that going to affect the sales in some way?

THE WITNESS: But, your Honor, it could go either way.

THE COURT: Sure it could.

THE WITNESS: Unfortunately all this happened out of it. OK. So I made the album knowing full well that I was making an album I didn't write. But I made it for a specific reason. I didn't want to write it. I wanted to do something as if I was 15. That was the reason I did it. And it is a good chance it could have gone either way. I might have been taking a risk, sure, and if nobody ever told me, "Don't do it" -- no record company people said, "Don't do it, it's a terrible idea" -- I thought it would be a good idea and it would be fun and it could have gone either way. It could have been the biggest seller I ever had and it could have been the lowest seller. There is no way of knowing.

If people knew how to sell, we would all be sitting in Miami, so it is not the same as this. But there is a good chance it could have sold twenty times more. I might have done Volume 3 and 4 if it had gone the other way.

Q Or it could have sold a lot less?

THE COURT: But how does one find out?

THE WITNESS: Only by putting it out.

THE COURT: Right, I agree. But now that it is out, and we are sweating in this lawsuit endlessly about what caused it to be 342,000 rather than 450, which is --

a subject that concerns Capitol endlessly, I guess and everybody else. And I hope it will stop some day. But anyway, how does one find out what caused it? I mean, do you know how the-- aside from the advertising gimmicks and all that, how the public reacted to this as far as its quality and enjoying it?

Did people like it as well as your material? How does anybody find that out?

THE WITNESS: Well, you see, there's only the public you can go by. You have to accept their final word. I mean, I have plenty of these hearsay things. Some people like some of the tracks that were left off the album better than the ones that were put on. Some prefer the thing that I thought was terrible. Some fans have sent me messages either in a letter or on the street that they like the album better than my own stuff. Others don't like it at all, and there is no way of knowing, you know, and there is no way of -- I cannot judge it. They either buy it or they don't buy it.

I think it does harm it if there is not a clear-cut campaign, if the radio stations don't know what is going on. They have to know what is going on. But that is Capitol's problem. They have to --

THE COURT: Now the radio stations,you say, did

not have the--

THE WITNESS: They only have so much space. If there is any doubt about a record, they will leave it off.

THE COURT: How about these interviews you said --

THE WITNESS: Interviews that would guarantee me exposure. They will play the whole album.

THE COURT: What is your usual thing about interviews?

THE WITNESS: Normally I will sweep the country. I wouldn't leave-- I wouldn't go physically, but Capitol will arrange it so as I talk to every area in the country including Lincoln, Nebraska.

THE COURT: And in what form do you do that?

THE WITNESS: Either by phone or they will fly somebody in to meet me. They will come in with a tape recorder.

THE COURT: What kind of people, disc jockeys?

THE WITNESS: Disc jockeys, station managers, anybody Capitol thinks I should meet. Sometimes it is a station manager like the whole West Coast. There is one guy on the West Coast, one guy on the East Coast. If you see them, you are all right for both coasts.

THE COURT: Who are they?

THE WITNESS: One is called Rick Sklar, head of

ABC Radio here, very important guy. The otherone is called Paul Drew on the West Coast.

THE COURT: Paul Drew, what does he do on the West Coast?

THE WITNESS: He is with KHJ.

THE COURT: They are radio people?

THE WITNESS: Yes, very big people.

THE COURT: What do they do?

THE WITNESS: He decides what goes on the radio practically on the whole of the West Coast, and the other guy decides on the East Coast.

THE COURT: What do you do generally, interview them?

THE WITNESS: They will interview me and play the whole album. Well, Paul Drew does interviews. Rick Sklar doesn't do them. He will arrange for me to go on WNEW which I did with the Rock and Roll album.

THE COURT: What is your point?

THE WITNESS: This time for the Rock and Roll all I could do is WNEW locally in New York. I didn't have time to go out to the coast and talk to everybody.

Q Why?

A Because they just -- Capitol said there was no time. Normally I go down there and spend a week before the

album comes out. The album was already o-t.

Q Why couldn't you go out?

THE COURT: What do you spend a week doing?

THE WITNESS: Sit in a hotel room and they bring these people in day after day, three or four interviews a day, for magazines, radios. I am on the phone. They have a whole big schedule for me which I spend a good week on.

THE COURT: And this occurs when?

THE WITNESS: Before the album goes out. Or just as it is going out. I mean, they time it. They call me and they say, "Can you come?"

I say, "OK."

I get in the plane, I arrive there. They have it all organized and I just go through it like a ritual.

Q Did you do that on each and every album that you have put out?

A I think I have done it on all of them.

Q Shaved Fish?

A Shaved Fish, I didn't, because I was having a baby in the hospital. I couldn't leave the hospital. I mean there are occasions like, you know.

Q How about Mind Games?

A Mind Games I was down there.

Q You spent the week out on the Coast?

A Yes, I spent a week, I spent more than a week. Yes, I was there.

Q Why couldn't you have gone out a week later to do the interviews?

A I don't decide it. Capitol must have decided that there was no point. I don't know. But I know there was no coordination for this album. It was just --

Q Do you remember Frankie Crocker, the black disc jockey who testified in this trial?

A Of course.

Q Do you remember he had offered to interview you on the air?

A I don't make deals with disc jockeys myself. Any interviews I do go through the record company. That is what they are there for.

Q You don't really know the reasons why there were no subsequent interviews, do you?

THE COURT: He has really said that.

MR. SCHURTMAN: He doesn't know. All right.

Q Now, let me ask you this. We just looked at the Roots commercial.

A Yes.

Q Would you have any views as to whether a teenager

or any one of your fans -- we keep saying teenagers -- but I assume there are some adults who also follow your stuff, so I don't mean to exclude them-- the people who saw the Roots commercial on the air, and it was only on the air for a few days,and it says "John Lennon Singing the Old, Famous Old Rock and Roll Songs" and so on. And let's say a couple of weeks later they walk into a record store and lo and behold they find an album that says "John Lennon, Rock and Roll," and they look at the titles and they seem to be the same titles that are in the Roots commercial; why wouldn't somebody like that remember the commercial and say, "Hey, here's the album, and it is even cheaper than $4.98, I am going to buy it now"?

A I wish it had happened.

Q Do you know whether it did happen or didn't happen?

A I don't know.

Q OK.

Can we take a short break?

(Recess)

MR. SCHURTMAN: Your Honor, I am almost finished with Mr. Lennon, but I do wonder if I can do this: I am trying to pin down the contrast between characteristic Lennon and non-characteristic Lennon.

Perhaps I could play one or two cuts from Imagine which was the biggest seller, and then follow that with Rock and Roll and perhaps we can hear the difference.

A May I just say one word before you do it?

Q Yes.

A I was trying to explain about what kind of rock and roll was on the Imagine, the second track called Crippled Inside, and I compared it with some early Sun records.

THE COURT: Some early what?

THE WITNESS: Sun was a label, a man who produced Elvis Presley and all the great white artists, he had them all on one label. Well, amongst the other tracks on the Rock and Roll album that I deleted, which never got on the album was a track in the same style in that Sun style. It was called Since My Baby Left Me, and it was an early Presley record, and I did it, but it didn't turn out good enough. So it never went on, but it is a specific style of rock and roll and there is not one of that kind of rock and roll on the Rock and Roll album because I only had the one and it wasn't good enough, so it didn't get on.

So that saves him playing it, really. Crippled Inside is the one from Imagine.

MR. SCHURTMAN: Well, let the record show that I am going to play Defendant's Exhibit CB-5 Imagine, and I am going to ask the engineer to play the first cut, which is entitled Imagine. That is something that Mr. Lennon wrote.

THE COURT: All right.

(Record played)

MR. SCHURTMAN: I am next going to play Plaintiff's Exhibit No. 35, John Lennon Rock and Roll, the Capitol album, and I will ask that the first cut be played. The first selection is Be-Bop-A-Lu-La.

(Record played)

MR. SCHURTMAN: Does your Honor want to hear more at this point?

Q Mr. Lennon, do you follow the progress of your albums in terms of sales?

A Not madly, no.

Q Do you try to get some idea of what the position is on the charts?

A I read the charts, yes. They are not as painful as the sales.

Q You do read the charts every week?

A Charts look better than the sales.

Q Did you follow the charts on Rock and Roll?

A I have watched them,yes. I don't remember what happened to it.

Q Mr. Lennon, I show you Plaintiff's Exhibit 250A for identification which is a summary of how Rock and Roll did on the Billboard charts?

A Yes.

Q It shows that the week ending March 15, 1975, it had hit No. 18 on the charts?

A Is that the second week out?

Q No, the album was released on February 13. Then the Billboard issue of March 8, 1975 shows that it appeared on the charts for the first time as No. 47.

The following week, March 15, it was No. 18.

A Yes.

Q The following week, March 22, it was No. 12.

The following week, March 29, it was No. 10.

The week of April 5 --

A How did it do in Cash Box and Record World?

MR. BERGEN: Can we have who prepared this chart?

MR. SCHURTMAN: Yes, we have all the Billboard charts with us and I am certainly prepared to offer them.

THE WITNESS: What about Cash Box and Record World?

THE COURT: Now, we take your representation.

We have them and this is what it says, subject to correction.

All right.

Q Now by the week of April 19, it had hit No. 6.

A In Billboard charts, yes.

Q In Billboard charts, and then it started to go downhill again.

A Yes.

Q And the week of June 14 it is up to No. 128.

Now based on your experience with your own albums, did this one do well in the Billboard charts initially?

A The numbers are OK. But it doesn't mean anything about the sales, these numbers. Billboard is entirely different from Cash Box. Usually Cash Box is different from Record World.

Q Do you know how it did in Cash Box and Record Wrold?

A No. But the record company can get you in the charts even before your record is out. They can get you in the Top 100 without the record being in the stores.

THE COURT: How do they do that?

THE WITNESS: I don't know how they do it but they do it.

THE COURT: What is Cash Box?

THE WITNESS: It is another one of these: Billboard, Cash Box and Record World, and they all vary a little.

MR. BERGEN: They are trade publications.

THE WITNESS: Sometimes they will all be the same No. 1 record but not always.

t3

t4/1 pm

THE COURT: Are they supposed to reflect consumer sales?

THE WITNESS: No, I don't think so.

Q Do you know?

A I know they don't reflect that.

Q How do you know that?

A Because Ijust know that.

Q They said that, did they?

MR. MC HUGH: I object to that.

A They reflect what is shipped to the retailer.

Q They reflect what is sold by retail stores?

A That is not what the record companies told me.

THE COURT: Anything more from Mr. Lennon?

Q Do you know whether Rock and Roll did better or worse on the charts?

A No, I know it will be different.

Q Mr. Lennon, are the charts similar to the best seller lists for books that you find in the New York Times and so on?

A I don't know, because I once had a quarter of a million selling books and it never got in the top ten.

MR. SCHURTMAN: I have nothing else.

MR. BERGEN: Your Honor, very briefly?

MR. SCHURTMAN: May I offer that summary

chart?

MR. MC HUGH: I have an objection to the admission.

THE COURT: What is that objection?

MR. MC HUGH: The objection to the admission of the charts is there is no foundation to show what the charts demonstrate at all.

THE COURT: We have had a talk about those charts before. I will receive them.

What is the number?

MR. SCHURTMAN: 250-A, and I want the record to show that the underlying Billboard charts are in the courtroom and counsel may look at them.

THE COURT: Yes. We don't need them.

(Plaintiffs' Exhibit 250-A was received in evidence.)

MR. BERGEN: I just want to put on the record with respect to Defendants' Exhibit DO, Concert Magazine is published in Philadelphia, and that excerpt is from the April, 1975, issue.

I also have determined or Mr. Granett has through Capitol that the other two reviews, one is from the TV Star Parade, July 20, 1975, issue, and the other is from a newspaper, I gather, the Van Nuys News and Green Sheet.

If I could introduce them. Could we just add them to Exhibit DO?

MR. SCHURTMAN: Van Nuys, California?

MR. BERGEN: Yes.

MR. SCHURTMAN: Could we have an indication of whether these are magazines or newspapers of wide circulation? You may recall when I offered my reviews I asked the witness about Rolling Stone and about the Village Voice.

THE COURT: I know Van Nuys. It is across the mountain from Los Angeles, in the valley. I kind of get the idea where Lincoln, Nebraska is, and Van Nuys.

MR. SCHURTMAN: I won't belabor the point.

(The exhibits referred to were added to Defendants' Exhibit DO in evidence.)

REDIRECT EXAMINATION

BY MR. BERGEN:

Q Mr. Lennon, do you know who owns at the present time the inventory of Tetragramaton Records with respect to the Two Virgins album?

MR. SCHURTMAN: I object. How is it relevant to anything.

THE COURT: I don't know what it is relevant to.

MR. BERGEN: They are charging as to the Two Virgins album that it is in bad taste and I want to show on the record who owns those records now.

MR. SCHURTMAN: It is not relevant.

THE COURT: I will sustain the objection.

MR. BERGEN: I have no further questions.

THE COURT: Thank you.

(Witness excused.)

A N T H O N Y V. S T E V E N S, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROY:

Q Where do you reside, Mr. Stevens?

A 25 Clairman Avenue, New York City.

Q By whom are you presently employed?

A Master Cutting Room at 321 West 44th Street.

Q Is the Master Cutting Room connected with the Record Plant or are they located in the same facility?

A They are located in the same building, yes.

Q How long have you worked for the Master Cutting Room?

A Two months approximately.

Q What is your position at the Master Cutting

Room?

A Master Cutting Engineer.

Q Is that the job you have held for the two months that you have been with the Master Cutting Room?

A Yes.

Q Prior to the Master Cutting Room by whom were you employed?

A By the Royal Opera House, Convent Garden, London, England.

Q What was your position with the Royal Opera House in London?

A Sound engineer.

Q How long did you work at the Royal Opera Company?

A Three years.

Q Prior to the Royal Opera Company were you employed?

A Yes.

Q By whom were you employed?

A Ferber Studios, Paris, France.

Q What was your position in Ferber Studios?

A Assistant Maintenance Engineer, Studio Maintenance.

Q Could you please tell the Court the difference

between that position and the position in terms of your duties, if significant, between the position you hold at the Master Cutting Room and the Ferber Studios?

A Yes, the difference is the maintenance engineer is in charge of alignments and general duties in the studio, operational equipment; master engineering is cutting discs.

Q Have you had any other employment in the music recording industry?

A Before that I was mastering engineer at Command Studios in London.

Q How long were you employed there?

A Two and a half years.

Q Were you employed prior to --

THE COURT: Why do we have to go into all this?

MR. ROY: I was trying to show his experience. I think we have covered that.

Q Do you know a gentleman named Gregg Calbi?

A Yes.

Q Can you tell the Court who that gentleman is?

A He is my predecessor; he was cutting mastering engineer at the Record Master Cutting Room.

Q I show you a document that has been marked

as Defendants' Exhibit BQ-1 for identification. I ask you if you will please tell the Court what that document is.

A These are set up and mastering instructions as used by the Master Cutting Room in mastering a record.

MR. SCHURTMAN: Before the witness proceeds, is he testifying as an expert witness?

MR. ROY: He is identifying right now certain documents and telling what they are. These are the mastering notes that Gregg Calbi did on the Rock and Roll album.

pm MR. SCHURTMAN: When the lacquer master was made.

MR. ROY: Of that record sitting on your table?

MR. SCHURTMAN: You are having him identify the notes made by Mr. Calbi?

MR. ROY: That is correct.

THE COURT: What is Exhibit BQ-1?

Q Mr. Stevens?

A These are set up and instructions for mastering record as used by the Master Cutting Room.

Q This is the Rock and Roll record?

A This is for the Rock and Roll album, yes.

Q I show you a document which has been been marked BQ-2 for identification and ask you to identify it.

A This is a similar document, this is for Side 2

of the album. The other exhibit is for Side 1.

Q Are you familiar with the handwriting of Gregg Calbi?

A Yes.

Q Can you tell us whose handwriting appears on BQ-1 and BQ-2?

A Yes, I can.

Q Whose handwriting is that?

A It is Gregg Calbi's.

MR. ROY: I will point out to the Court that Plaintiffs' Exhibit 35 in evidence on the back cover, which is the Lennon Rock and Roll, in the middle are notes indicating that the record was mastered in the Master Cutting Room and the name Gregg Calbi appears following that.

THE COURT: Are you offering these?

MR. ROY: There are one or two masters that need to be attended to.

Q Will you please turn to the reverse side of BQ-1 and 2. Can you tell me what the sheets stapled to the back of those two exhibits are?

A These are the preliminary setup and instructions which are made when a disc is cut. After this has been approved by the client, then this is written up on the other sheet, that is, your Exhibit BQ-1 and 2, and on this form

it is final. In other words, the final version of how the album is cut.

Q When you refer to the final version, you are referring to the front side?

A Yes, sir.

Q Which has the vertical columns?

A Yes.

Q Do you know whose handwriting the reverse side notes are in? In whose handwriting?

A Gregg Calbi's.

Q The notes that you are looking at, the documents that are BQ-1 and BQ-2, are those documents kept as a matter of course by the Master Cutting Room?

A Yes.

Q Are they kept on file?

A Yes.

pm

Q And what is the reason for keeping them on file?

A The reason is because we have to do re-cuts of an album, therefore, we have to refer back to these so they can be done identically. You can't remember all these things in your head.

Q The notes that appear on the front side, the side with the vertical columns are the notes for the John Lennon Rock and Roll album?

A Yes, that is right.

MR. ROY: Your Honor, I would offer these in evidence.

THE COURT: Any objection?

MR. SCHURTMAN: No objection.

THE COURT: Received.

MR. ROY: I don't propose to go through the entire document and all the notations, but perhaps we can do one or two of the tracks that are indicated in this.

THE COURT: What is the point?

MR. ROY: Your Honor, these documents show that each and every track on the Capitol Rock and Roll album were when mastered set at different levels and that settings with respect to each track were done

individually.

THE COURT: Just briefly get into that.

(Defendants' Exhibits BQ-1 and BQ-2 were received in evidence.)

Q Mr. Stevens, I show you Defendants' Exhibit BQ-1 and I would direct your attention to the first line where the word Be-Bop-A-Lula appears. Will you start reading from left to right? Indicate to the Court what the entries indicate?

A The first entry is the time of the track, that is, two minutes 36 seconds.

The second entry is the title of the track; at the end of that there is a setting which we call review offset, which has to do with information that is sent to the computer which operates the lathes, cutting lathes; the third and fourth column are the levels for that band, the left and right channel; the next two columns are equalization, that is, frequency equalization for that fact, and that is written as what level, how much equalization is used.

In this case he has used plus 4db, that is, decibals at the frequency of 4 kiloherz.

Q Now, I would like you to look at Defendants' Exhibit BQ-1 and BQ-2 and examine the other

tracks that are indicated on those exhibits. Are you able to determine if, in fact, the settings were used for Be-Bop-A-Lula as were the other tracks or did they differ?

A They differ.

Q Are all of the tracks different in one respect or another in terms of settings that are indicated on these documents?

A Yes, they are, they are all different.

Q Turning those documents on the reverse side, for lack of a better term, the initial notes, do those from your looking at them indicate that the settings were identically done in preparing or are those different than the final settings?

A Some of them are different; others are the same.

Q In the upper left-hand corner following the logo, following the cutting room, appears the word "Dolby".

A Dolby is noise reduction system which reduces tape noise on master tapes, and in order to play back this tape it has to be fed into a Dolby unit.

Q Am I correct, Mr. Stevens, that the indications on these documents are different settings on different

tracks, that the change in these settings affect the sound that is ultimately heard when the record is listened to?

A Yes.

MR. ROY: May we have this marked as Defendants' Exhibit Q.

(Defendants' Exhibit Q was marked for identification.)

MR. ROY: Your Honor, at this time I would offer to stipulate with counsel for the plaintiffs that Defendants' Exhibit Q for identification is what is the original of mastering notes used by Bell Sound Studios in preparation of the lacquer master for the Roots album, and that these notes were prepared by Joseph Brescio, the master engineer.

MR. SCHURTMAN: I will not so stipulate.

THE COURT: Where did you get this?

MR. ROY: We got this from Mr. Brescio at an examination before trial at which Mr. Brescio --

THE COURT: Wait a minute. Is the document identified in Mr. Brescio's deposition?

MR. ROY: Yes.

THE COURT: Why can't you use that deposition as a foundation?

MR. ROY: We will be happy to.

MR. SCHURTMAN: Mr. Brescio is not a party. He is available in New York City. They can subpoena him. He is not under our control.

MR. ROY: A number of days ago I personally advised Mr. Diamond that we would seek to ask to stipulate. All we are asking for is a stipulation of the authenticity of the document, that it is what it purports to be, the notes he used. That is what Mr. Brescio testified to. Moreover, he is represented to be the expert relied upon by Mr. Morris.

THE COURT: Are you going to call Mr. Brescio?

MR. SCHURTMAN: At this time I don't know. It depends on what they put in, but I will not stipulate.

THE COURT: You will know some time in the next two weeks when we resume this case, whenever we get through. Why don't you think about whether you are going to object to this document and call Mr. Brescio and see how much time you want to take up.

In the meantime, they can subpoena him and do anything they want. it is an utter waste of time.

MR. ROY: It struck us as an utter waste of time.

MR. SCHURTMAN: If you are criticizing me for

not stipulating, I don't control the man and I would not agree to the notes going in without the man.

THE COURT: These are standard notations that anybody can explain. The man is the cutting master engineer, but it is not stipulated, so we will waste time in some other way in addition to all the other ways we have been doing. Let us go on.

MR. ROY: May I, your Honor, subject to subpoenaing Mr. Brescio and subject to striking it if we are not able to authenticate this document, show it to Mr. Stevens?

THE COURT: No.

MR. ROY: We can establish that he is, in fact, able to decipher it.

MR. SCHURTMAN: I am sorry --

THE COURT: I am not going to sustain any objection.

MR.SCHURTMAN: Let me state the reasons for my objection.

My objection is once you start asking the man to explain or decipher somebody else's notes, he is testifying as an expert, and they have not identified him as an expert. I have not had an opportunity to talk to him.

THE COURT: I disagree. It is a fact question.

Let us go on.

We got all this equipment here and we are supposed to hear Mr. Marsh.

Q Let me show you this, Mr. Stevens. Let me ask you one question before you look at this document. To your knowledge and based on your experience, are the symbols, the letters, the other numbers that appear on Defendants' Exhibit Q, are those standard throughout your trade?

A Yes.

Q Is one mastering engineer, to your knowledge, capable of reading the notes of another?

A Yes.

Q And do you, in fact, have occasion to read Mr. Calbi's notes in the course of your present duties?

A Yes, I have to interpret three predecessors.

Q In examining Defendants' Exhibit Q for identification, this small 8 x 10 card, are you able to decipher the symbols that appear on the card?

A Yes.

Q What do they indicate to you?

A Well, quite simply, they indicate the settings for each track of both the A and B side of the album, identical for each track.

Q In other words, the settings used in the lacquer masters were set at identical limits?

A Yes.

Q Are the levels different from the levels set at Mr. Calbi's notes?

A Yes.

MR. ROY: I have no other questions.

THE COURT: Any cross?

MR. SCHURTMAN: I have not seen these before. Will you give me a moment to look at them?

THE COURT: Surely.

MR. SCHURTMAN: To the extent the man testified as an expert, I am not ready to cross examine him. I have not had an opportunity to do anything. Consequently, I can't cross examine him.

THE COURT: No cross. You may step down.

MR. ROY: Just two sentences.

Firstly, Mr. Schurtman was present at the examination before trial of Mr. Brescio.

MR. SCHURTMAN: I was not.

MR. ROY: Mr. Kanzer and Mr. Diamond. Mr. Brescio testified virtually to the same thing that Mr. Stevens has just testified to.

THE COURT: You can't do that. As far as

it being expert, this is testimony about the fact of the settings that were made on the making of the lacquer master. If you have no cross, the witness may step down.

Let us go to the next witness.

(Witness excused.)

MR. ROY: Is Defendants' Exhibit Q received?

THE COURT: No, I can't receive Exhibit Q.

D A V I D M A R S H, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BERGEN:

Q Will you just speak up a little bit. What is your address?

A 40 East 57th Street in Manhattan.

Q Whom are you employed by?

A Rolling Stone Magazine.

Q What is your title at Rolling Stone Magazine?

A My title is Associate Editor and I am in charge of two critical sections of the magazine, the record section and the peformance section, the two review sections of the magazines, plus a column called American Grandstand.

Q Tell us briefly what is Rolling Stone Magazine?

A It is a bi-weekly tabloid magazine which

began as an exclusively rock music magazine, and the magazine has branched off to the leftist branch of political stuff. The circulation is about 450,000 and, certainly, the largest and probably the most respected of the pop music magazines in the country.

Q Is Rolling Stone Magazine or the reviews that appear in Rolling Stone Magazine also syndicated?

A Yes, they are syndicated to over 100 papers in the country, and recently by the New York Times syndicate in Europe. I am not sure how many papers.

Q Can yo tell us briefly your background, starting with college?

A I wrote for my university newspaper; I grew up in Detroit and went to Wayne State University. There I wrote for the university paper, the South End on pop music and other subjects, and after a year I left college and that paper to write what was then called underground papers and beca n editor on the Creem Magazine, which is probably the ond most respected and probably the second largest pop music magazine in the country.

5pm

Q Is that a magazine that is based in Detroit?

A That magazine is based just outside Detroit.

MR. SCHURTMAN: What is the name of that?

THE WITNESS: Creem.

A And I was there until -- that was in 1969. I was there until 1973 when I went to Newsday, which is the daily newspaper on Long Island, as pop music critic.

In early 1974 the Newsday job, which was just a temporary job, ended, and I went to Boston where I worked at the Real Paper which was a Village Voice style weekly up there.

In mid-1974 I came back to New York City and back to Newsday in August of 1974 where I was until last June when I came to Rolling Stone.

I have also done some free lancing and I have done a book on Bruce Springsteen, who is a rock artist.

THE COURT: What is his name?

THE WITNESS: Bruce Springsteen, who is a rock artist who came to stardom last year.

Q And you wrote a book about him recently?

A Yes. It will be out I think July, Pocket Books.

Q Do you have any formal musical training?

A No, I don't.

Q Can you tell us briefly the importance of rock

music criticism?

A Well, I think it serves a couple of functions. First of all, as a sort of consumer guide function, in order to both alert people to records of quality that they might overlook because they are not being played on the radio, and it also serves, I think, to raise interesting questions about the music itself which since The Beatles has become more and more accepted as an art form.

Therefore, in one way it operates strictly as a reviewing medium; in another way it operates in the tradition of art criticism in more accepted fields.

Q Does Rolling Stone review most rock and popular albums?

A Let's say most rock and popular albums of either commercial or esthetic significance because there are so many that there is simply not space.

We review an average of 18 per issue which is about 35 or 40 a month.

Q Do you know John Lennon?

A Yes, I met him here.

Q When was the first time you met him?

A The first day I came here.

Q Just recently?

A Yes.

Q Can you describe again briefly to the Court the importance in your view of The Beatles and their music?

A The Beatles' musical importance I think is that at a time when popular-- popular music had an explosion in the 1950's.

THE COURT: Had a what?

THE WITNESS: Had a sort of explosive effect on teenagers in the 1950's. That died out for a time. The Beatles resuscitaed that socially, that idea of popular music as a social force. I think they then took rock music and brought it back somewhat more into line with the American popular music tradition, I mean in terms of sophisticated arrangements, sophisticated use of vocal harmonies, but without ever sacrificing the sort of elementary general explosiveness that rock had initially.

I mean -- that is a very brief summary of what their importance was.

Q Can you describe in musical terms what The Beatles music represented?

A I don't understand the question, I don't think.

Q Well, was it simple music, was it complicated or sophisticated?

A It began as very simple basic four-four beat rock and rcll, two guitars, base, drums. As it developed

through their more or less ten-year career, it became incredibly more complicated until tye the time of a record like Sergeant Pepper they were using full orchestras, full orchestrations, and things that were simply before they began in the terms of teenage music, which was basically what they were making, were unheard of.

And also the idea that they controlled their own music artistically was really crucial because people like Phil Spector were the record producers,they were making records with orchestras and things, too, but it wasn't the people who were singing and playing on the records, they were not in control.

Q In other words the Beatles -

A The Beatles were a self-contained and very sophisticated unit by the end and spawned a wholly self-contained, very sophisticated industry of the same thing.

Q You mean the artists themselves controlling the records and the production of the records?

A Yes, and stage performances, the whole shot.

Q What about the covers of the albums?

A That's another area. I mean, again, it started out very simple because the record business, the figure that I have heard bandied about was quadrupled when the Beatles arrived. I don't know if that is accurate or

not but that is a working guess. It certainly grew much larger. When it began it was very simple. They were thrown together as it developed. Again in Sergeant Pepper, which is an incredibly detailed depiction of I don't know, dozens or maybe hundreds of faces, I mean it is -- as time went on, and that began a little bit before.

Q I show you Defendant's Exhibit CB-2.

Is that the album cover you are referring to?

A Yes, this is. And again this is, I mean, it became -- Sergeant Peper was really considered the first what is called the conceptual album; in other words, from the cover to the individual songs and the way they are presented and the lyrics that were written, it was designed to project a single theme, a single idea, and the idea was of The Beatles as a lonely hearts club band, as a sort of traveling carnival of rock and roll and popular music, or at least that is the idea I took it to be.

Q Now, can you tell us what role John Lennon played in The Beatles music?

A Well, he was first of all, with Paul McCartney, the group's principal songwriter and one of its two principal singers with Paul. More than that, I think to many people who were growing up at the time I did, John was in The Beatles the quintessential representative of that sort

of '50's rock and roll spirit that as The Beatles' music grew more sophisticated, there was always a danger of losing,and really what made the music most exciting was the tension between the sophistication, on the one hand, and the primitivism, on the other.

I don't mean to imply by that that John's solely a primitive artist, because he is not. But I mean to say by that that he operates within that kind of artistic tension between sophistication and primitivism. And that was his role in The Beatles as I saw it, it was to substantially introduce that tension from one side or the other.

Q Can you give us an example of a song that Mr. Lennon wrote while he was with The Beatles that you thought was kind of representative of his talent?

A There was a song that was the title song from their movie called Help which was a basic rock and roll song with a basic rock and roll lyric. Yet at the same time there was a song, which I believe is John's, that I associate with John, on the same record, called Ticket To Ride which introduces a guitar line that I don't know where he got to this day.

And then there are other songs. I mean I can't do it with a single song,because it varied from song to song within the text of the album usually.

There was a song like Norwegian Wood basically used some kind of Indian influence to -- and an incredibly complicated lyric that was, I mean it was just the contrivance of the lyric itself is very artistic.

On an album called Rubber Soul which comes to mind there is a song,a record called Strawberry Fields Forever, which is not so much for any of those things but just for the total effect as a record which John wrote is remarkable in terms of its use of distortion effects and things like that.

Q Would you say that Mr. Lennon was the most creative member of The Beatles band?

A I would say that with Paul McCartney he was the most creative member of The Beatles band.

Q Do you still consider Mr. Lennon an important artist today?

A Absolutely.

Q Can you tell us why?

A Well, I mean, in a way I think that John has become a more important artist since he struck out on his solo career and when I say solo career, having witnessed yesterday's testimony, can we decide that I mean from the Plastic Ono Band album?

THE COURT: OK.

A Plastic Ono Band album came out at a time when many people who had been through the various countercultural trips of the '60's, drugs, sex, politics, rock and roll, were beginning to reflect back on exactly how self-indulgent and perhaps self-destructive they had become. And in very direct terms, the songs on that album discuss one man's journey through that time. That is what the song The Dream is Over is about.

THE COURT: What is the song?

THE WITNESS: The Dream is Over; I think that was played yesterday.

Q Is that on the Plastic Ono Band?

A Yes, the last track, I think. I could be wrong about that, but as he sings "I don't believe in God, I don't believe in Jesus, I don't believe in Dylan, I don't believe in The Beatles"; when John Lennon says "I don't believe in The Beatles," first of all, it was the first time that anyone had really convinced anyone that The Beatles were not going to come back together again, which was a shock to the young audiences that rely on rock and roll. And I don't mean to dwell on that song too much but really, what John meant to me is what one does after that adolescent dream of rock and roll is over.

And he has done that, I think, in very brave

risk-taking ways, and I think the Imagine album also is a part of that.

Q What?

A The notion of imagining, being able to imagine a world with no rules or religions or politics or structure.

Q What do you mean by risk-taking?

A I mean taking a chance that he is going to say something (a) that might offend somebody; (b) that might not be understood; (c) that might not be commercial and therefore could affect his career economically. I mean all of those things and I think John has simply done all of those things.

Q Mr. Marsh, I show you Plaintiff's Exhibit 35 which is the John Lennon Rock and Roll album and ask you if you have ever seen that record?

A Yes, I have.

Q Can you describe that album and what it, in your opinion, it purports to do?

A It is an album of about a dozen '50's and early '60's rock and roll songs which basically is John Lennon's interpretation of the tradition of the rock and roll tradition out of which his own work has grown.

Q Would you describe it as kind of a musical history?

A It is a musical history, it is again what I call

Sergeant Pepper, it is a conceptual album. All of John's records are conceptual in the sense of building around a unified theme.

Q Will you also say that doing that rock and roll album was a risky thing for Mr. Lennon to do?

A It was for this reason: The songs that he was doing are considered in the rock and roll community to be classics both in terms of the songs themselves and the performances of the songs.

The first thing he had to tackle in that was the notion of himself as the quintessential rock and roller; secondly, he had to take the chance that he could beat at least one or two of them -- one or two of the greatest songs in the history of rock and roll. That is risk to me. Those two things. I mean he put out- his reputation as an artist on the line, doing this project. I believe that.

Q Have you ever heard the Rock and Roll album?

A Yes, I have.

Q I show you Plaintiff's Exhibit 34 which is the Roots album and ask you if you have ever seen that album.

A Yes, I have.

Q Have you ever heard that album?

A Yes.

Q Did I ask you to play both of those albums?

A Yes.

Q So that you could contrast them?

A Yes, you did.

Q Do you recall when that was?

A About, I would guess about three weeks or a month ago, it could have been a little longer, a little less.

Q And you play the two of them?

A Yes, I did.

Q More or less at the same time or one right after the other?

A I played them -- unfortunately I only had one turntable to do it with, but I played them in a track-by-track comparison. I don't mean track one, side one. I mean Be-Bop-A-Lula, Be-Bop-A-Lula, in that kind of sequence and I did that, yes. It me a couple of hours to do it.

Q Because the two albums are in a different sequence?

A Yes, the sequence is different. I didn't want to give the impression that I compared them song by song, I should say.

Q Did you thereafter write me a letter with respect to your comparison of the two albums?

A Yes, I did.

MR. BERGEN: Your Honor, I would like to mark

this as Defendant's Exhibit DP.

(Defendant's Exhibit DP marked for identification)

Q Mr. Marsh, I show you Defendant's Exhibit DP and ask you if that is the letter that you wrote to me?

A Sure is.

MR. BERGEN: I offer DP in evidence.

MR. SCHURTMAN: What is the date of the letter?

THE WITNESS: Is the letter dated?

MR. SCHURTMAN: When did you write it?

THE WITNESS: About a month ago.

MR. SCHURTMAN: A month ago?

THE WITNESS: More or less, three weeks to a mongh ago.

MR. SCHURTMAN: Your Honor, I am going to object. This man is testifying as an expert. He gave an expert's report. Mr. Bergen has apparently had it for three weeks to a month. We have repeatedly asked for information concerning experts and discovery. We were supposed to get it. We were entitled to get it.

What am I supposed to do with this now, if it is an expert's report?

MR. BERGEN: I called Mr. Diamond --

MR. SCHURTMAN: A few days ago.

MR. BERGEN: Let me finish.

I called Mr. Diamond a few days ago in the morning and told him that we were going to use Mr. Marsh as an expert.

He asked me what he was going to testify to.

I told him basically that he was going to compare the two albums and give his appraisal of the two albums, and how they contrasted.

He asked me whether he was going to testify about the technical aspects of the album, and I said he was not going to testify like an engineer in appraising the sound, but he was going to testify just as a listener.

MR. SCHURTMAN: Your Honor, this is an expert's report.

THE COURT: Now --

MR. SCHURTMAN: It was held for a month.

THE COURT: When we were together before, my memory is, and maybe the record will reflect something contrary, but I don't think so, my memory is that I was the one who said that I would need assistance in appraising the differences between the records if anybody was to present that.

Now, everybody kind of looked at me in a way, and I think I was fairly insistent, and I have been assuming

that this gentleman is here in response to that.

MR. BERGEN: Your suggestion, your Honor, is what prompted me to -- I don't recall when it was but within a week after that, to contact Rolling Stone Magazine and I was put in touch with Mr. Marsh.

I brought the two records to Mr. Marsh. I gave them to him and left them with him, and the next afternoon he sent over this letter to me.

I did not request a letter. All I asked him to do was listen to them and then I said I would sit down with him and he could tell me what his opinion was.

MR. SCHURTMAN. The point of my objection, your Honor, is not that the man is testifying. I have not objected. But the fact that Mr. Bergen has held an expert's report in his hands for three weeks to a month, and has not furnished me with a copy-- and I think that is a very valid objection, your Honor, under the discovery rules. We demand all experts' reports.

MR. BERGEN: Your Honor, I don't really believe that this is an expert's report.

THE COURT: What do you suggest? I don't need to have the report in, if he will testify.

MR. SCHURTMAN: Let him just testify.

THE COURT: Let's have him testify.

I want to take another matter for another minute. I will be back.

(Recess)

MR. SCHURTMAN: Your Honor, during the recess I read Mr. Marsh's letter and if I continue to object to the admission will Mr. Bergen simply ask the witness to repeat it on the stand because then we could save time.

MR. BERGEN: First, I think under the federal rules, they are not entitled to get an expert's opinion, a copy. They can have interrogatories about it.

THE COURT: What Mr. Schurtman is simply saying is this. He is asking would the witness testify to the substance of the letter.

MR. BERGEN: That is what I am going to do.

MR. SCHURTMAN: Can we save time by just putting it in then?

THE COURT: I think we could.

MR. SCHURTMAN: All right.

MR. BERGEN: No, I want --

MR. SCHURTMAN: You want it both ways. You want him to testify and you also want it in.

MR. BERGEN: I think his letter --

THE COURT: Go ahead with the testimony and then you are going to play some music. I am not going to

understand it from the letter anyway.

Let's go.

BY MR. BERGEN:

Q You have heard both of the albums and you said you compared each song?

A Right. Right. Exactly. I compared the two versions.

Q What is your opinion of the two albums?

A You mean --

Q Ccmparing them, which is the better of the two albums?

A The Capitol album is the better of the two simply because it seems professionally put together.

Q Now, having listened to the two albums, what is your opinion of the sound on the Roots album?

A It is shoddy, it is fuzzy. It sounds like those old bootleg records that kids used to make out of cassettes. Thatis what it sounds like to me.

THE COURT: You are going to have to talk a little slower.

THE WITNESS: I'm sorry.

A It sounds --

THE COURT: It sounds like what?

A It sounds like what were called bootleg records

that kids used to make out of cassette recordings made at Beatles concerts to me. I mean it sounds-- the sound quality is simply inexcusable.

Q Is there surface noise on the Roots album?

A Very much.

Q Does the surface noise obscure or inhibit any of the instrumental passages?

A Yes. And I told him that.

MR. SCHURTMAN: I object to Mr. Bergen's leading his own witness. Either ask him to give an opinion or put the letter in.

THE COURT: I am sure that Mr. Bergen and this witness have gone over the substance of the witness' testimony and Mr. Bergen knows that. And it really isn't -- this is your opinion, right, what you are telling us in court?

THE WITNESS: Yes.

THE COURT: It is not Mr. Bergen's opinion.

THE WITNESS: It is what I heard on the record.

THE COURT: All right. Let's go in some efficient way. It is all right with me.

Mr. Bergen, go ahead.

Q Can you describe what impact the surface noise in your opinion has on the Roots album and the songs on the Roots album, I should say?

A Well, on any music all the surface noise would get in the way of the music itself. I mean, music is a noise that is made deliberately and surface noise is a noise that is made not deliberately.

In this case it is especially crucial because John is trying to create a specific musical effect, or a series of specific musical effects in order to recreate that specific era.

Q Can you tell us what those specific musical effects are?

A A lot of that has to do with, well, on different tracks there is the different arrangements and stuff,tell their own story. But in general it has to do with -- because the music is so primitive, it needs to be very loud and I think the surface noise inhibits the volume on the record. It should be rough but those records were recorded crudely and not -- I mean they were recorded at a time when the technology was very crude, but certain parts of them should be very crisp, for instance, and they are not.

Q You are talking about the old rock and roll songs?

A I am talking about the old rock and roll songs.

Q So in recreating them --

A In order to recreat them these things need to be placed in a certain proportion, a certain perspective, in

relationship to one another and to the voice.

THE COURT: I am very sorry. I have an urgent call.

Just give me a second.

(Recess)

BY MR. BERGEN:

Q Can you tell us, Mr. Marsh, what the sound on the Roots album lacks?

A It lacks presence. I mean it is not there as fully as it might be. Sort of rock and roll-- old rock and roll was really punchy-like, and this is sort of flattened out. It is not as powerful as it might be. I mean those are the terms that I would describe it in, if I were reviewing it in Rolling Stone and I am just a little worried about the jargon here.

pm

THE COURT: Do what you need to do with this equipment.

MR. BERGEN: I will go to that right now.

THE COURT: I am quite positive this witness will have to come back. If we can get through with the equipment --

THE COURT: I am going to play the song Ain't That A Shame on the Roots album, Plaintiffs' Exhibit 24, and then after I finish I will ask some more questions of Mr. Marsh.

THE COURT: This is on Roots?

MR. BERGEN: Yes.

THE COURT: Who wrote this?

THE WITNESS: I am not sure. The original was writen by A. Domino.

MR. BERGEN: According to the linear notes on the John Lennon Rock and Roll album, Ain't That A Shame was written by A. Domino and D. Bartholomew.

(Record played.)

Q Now,Mr. Marsh, do you recall the difference between that version of Ain't That A Shame and the one that is on the Rock and Roll album?

MR. SCHURTMAN: Why don't we play it.

MR. BERGEN: I am going to.

THE WITNESS: In making comment about the '50s Rock and Roll, it is not all the same. There are several distinct regional styles. This style of music called New Orleans Rhythm and Blues, and it is characterized by a shuffle drum pattern, and the horns, both of which are derived from basic New Orleans. On the Roots album, as I remember --

MR. SCHURTMAN: Your Honor, can I suggest before the witness explains the difference, if you hear them both side by side while we still have it in mind?

THE COURT: That is a good thought.

MR. BERGEN: I am playing the same song, Ain't That A Shame, from the John Lennon Rock and Roll album.

(Record played.)

MR. SCHURTMAN: Your Honor, you have heard both songs one after each other in each album. We don't need someone to tell you what you have heard.

THE COURT: I don't. Do you want me to tell you?

MR. SCHURTMAN: Yes.

THE COURT: I don't think there is any comparison. The Rock and Roll is so much clearer; the vice was very poor and indistinct on Roots, it was almost

hidden there. I could not tell it was John Lennon singing or anybody singing; it was a voice. The elements, whatever they are, were all fuzzed up in Roots, and I don't know whether you call it surface noise or what kind of noise, but it was fuzzy, and I would not get anything much out of it. Now, the Rock and Roll, it seems to me, the voice was clear and distinct, and every other element was distinct, and the beat was distinct, and the different things that had very little impact of any clarity on the Roots album, were clear, and that is that.

MR. BERGEN: May I play one more?

THE COURT: I think it speaks for itself.

MR. SCHURTMAN: If those are your views, they are your views. Why do you need a witness to keep telling you what you just heard?

THE COURT: I guess I was the one agitating for a witness, but I had never heard that thing on this kind of equipment, with all due respect to my law clerk's stereo set.

MR. SCHURTMAN: Your Honor, you brought up another point. I think the equipment should be identified on the record, because I respectfully venture to say this is not the type of equipment the average teenager uses; this is highly professional equipment, and, obviously, the dis-

tinctions between the two albums will come out much more clearly on this equipment than that which a teenage uses.

MR. BERGEN: Why don't we ask Mr. Marsh about it?

THE COURT: That is a fair comment. I had the same reaction. My law clerk had a good stereo, but it is not professional like this. I had the same reaction when I heard that, and I would be happy for any professional assistance, and, certainly, I am not an expert or professional on this. I will be happy for an explanation. But I have just heard the records played.

MR. SCHURTMAN: I appreciate your guidance.

THE COURT: We will ask the witness.

THE WITNESS: My reaction is that the voice is blurred, the horns are not distinct, and it is crucial in this kind of music. That is what I would add basically. It is very crucial in New Orleans music that these horn patterns be distinct and separate, that the cornet and the baritone saxophones and the tenor saxophones be distinct entities. I mean, on the Roots album I had a moment of wondering whether that was a line of saxophones giving that riff underneath that goes through the song, or maybe it was a guitar, where you are losing, I think it is called, and, again, my jargon may be off, the lower part of the

note, the bottom of the harmonic, and that is on that line of baritones.

pm MR. BERGEN: Your Honor, the only reason I would play one more would be just to make it clear on the record that it was not that one particular song.

THE COURT: What kind of equipment do you have here? Let us identify that.

MR. BERGEN: I am afraid I could not. I guess I could ask Mr. Maiorino, who came and brought the equipment from the Record Plant.

THE COURT: What is the equipment?

MR. PETER MAIORINO: It comes from the Record Plant. These speakers are not used when we make a recording. These speakers are purchased by the Record Plant so a client can have some idea of what is taped or the record sounds like. These speakers are sort of for home systems. Don't let the voice scare you; they are just large speakers. That turntable can be purchased for the home. It is about a $175 to $200 turntable.

THE COURT: What would be the retail price of those speakers?

MR. MAIORINO: I really could not give you an honest answer. In the neighborhood of $250.

THE COURT: For the set?

THE WITNESS: No, for each. The amplifier is a Crown amplifier. They do not make this particular model any more,and that goes for about $600.

THE COURT: Well, anyway, we have it for the record here.

MR. BERGEN: May I ask Mr. Marsh what kind of a stereo system you used at the time the records were compared?

THE WITNESS: I listened to it on my office system, which is a BSR McDonald turntable, which costs about $100, and small Advent speakers, which cost $75 each, and a Pioneer tuner, which is in the neighborhood of $300 to $400, and just from my own experience, looking at Rolling Stone surveys on the kind of equipment our readers have, it runs anywhere from $250 to $750.

Q For the entire system?

A Yes, I would say that is a fair average. About $500, I think, is what a lot of people make an investment in music.

THE COURT: You heard it on your own particular set; you mentioned two sets --

THE WITNESS: No, I mentioned one set, which consists of two speakers, a turntable and a tuner-amplifier.

THE COURT: And the cost of that?

THE WITNESS: Total about $500.

THE COURT: What I am wondering, and I want to know if what I am hearing today is realistic or exaggerates things or what, and, of course, I can go on and play on other sets, but what is your view?

THE WITNESS: My view is I think I know what kind of speakers those are, though I don't recognize the case.

Are those electric Voice?

MR. MAIORINO: Altec 604s.

THE WITNESS: They are Altecs, and their characteristic is the same as Advent that I listen to. They are what is called a flat speaker; they don't add sound; they don't boost. I don't know how the high, low and mid controls are set.

THE COURT: Tell me how it sounded here compared to how it sounded when you played it before.

THE WITNESS: Exactly the same.

THE COURT: We will go to 5:30.

MR. BERGEN: I will play one more.

I will play Peggy Sue on the John Lennon Rock and Roll.

(Record played.)

MR. BERGEN: We will play the same song on the

Roots album.

(Record played.)

THE COURT: What style of rock is that?

THE WITNESS: That was done by a guy named Buddy Holly, who recorded in New Mexico with a guy named Norman Paddy. It was called Rock-A-Billy, and it is very, very similar to the style that John was referring to as Sun earlier today.

THE COURT: You described the Ain't That A Shame as New Orleans rhythm and blues. The word "Sun" does not mean anything.

THE WITNESS: Sun was a particular place in Memphis, a particular record company like Capitol, although it's much smaller, where Rock-A-Billy records were played. Rock-A-Billy, as the title indicates, is rock and hillbilly music.

THE COURT: So this is based on hillbilly rather than New Orleans?

THE WITNESS: Based on hillbilly music more than on black music or soul music or rhythm and blues music, as it was called then, but with an element, and Buddy Holly and the Sun people John was talking about this morning relied on the country; the Sun people used more R&B.

THE COURT: Meaning rhythm and blues?

THE WITNESS: Yes.

MR. BERGEN: May I just play one of the two songs that is off that is on the Roots album and that will be the last thing?

THE COURT: Sure.

MR. BERGEN: I am going to play Angel Baby, one of the two songs on the Roots album that was left off the Rock and Roll album.

(Record played.)

pm THE COURT: Any further questions?

MR. BERGEN: I have no further questions.

THE COURT: Is there some comment that should be made on that? I don't know.

Mr. Marsh, could you tell us?

THE WITNESS: Well, first and most obvious, that song is so badly out of tune that John isn't even singing in the same key as the band. If you would like my physical reaction to that, it was because the saxophone is so badly out of tune. I mean, that is the worst. The band is also out of tune with John. It sounds like the kind of thing you hear in strip, or like one of the strip shows one sees in the movies.

THE COURT: We have to set the inevitable

new date. Next Wednesday, April 7th.

MR. BERGEN: That is fine with me.

THE COURT: At 10 o'clock in this room.

MR. BERGEN: I believe, your Honor, so we know where we are going, I can finish with Mr. Marsh in another 15 minutes and that will be our case.

THE COURT: But Mr. Schurtman has to cross examine.

MR. SCHURTMAN: Yes.

THE COURT: If you want that document in, the other master--

MR. BERGEN: Yes, your Honor.

THE COURT: -- you better have that witness authenticate that. Then that concludes that.

Then we would have concluded, except for the attorneys' fees, which I am lying aside now. You have concluded Capitol's case and Lennon's case.

Does Apple intend to put on a case?

MR. MC HUGH: No, your Honor.

MR. SCHURTMAN: How about EMI? Is that part of Capitol's case?

MR. BERGEN: I don't think EMI is going to put on a case.

THE COURT: When Capitol says it rests, that

means EMI is resting. I think that is implicit.

Now, Mr. Schurtman needs to put on his case in defending the counterclaims and the affirmative case on his own claim.

Have you gotany idea of the extent of that?

MR. SCHURTMAN: It certainly should not be more than two days. I hope to keep it down to less than that.

THE COURT: Let us definitely finish by the end of that week.

MR. SCHURTMAN: Do you want briefs after that or do you want them in advance of the next hearing?

THE COURT: I would like to do what I did before. I don't think I can render an immediate decision, but I would like to work on it immediately and get it out within a week or two weeks, something like that, and not let a hiatus occur.

The trouble with posttrial briefs, you wait and then forget. Let us talk about that. I would like briefs as soon as possible. I don't want just gobs of briefs, but I think there are some things you want to call to my attention, and the sooneryou get it to me the better.

MR. SCHURTMAN: So far we have only been briefing the law. Would you like any summary of the

evidence or anything that will help you on that?

THE COURT: I would rather have oral argument. People come in with their contentions and briefing and just take a lot of time.

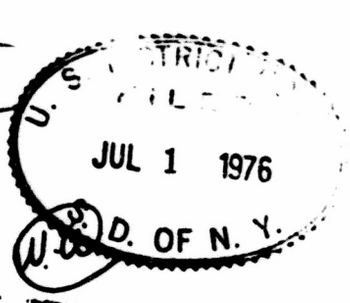
MR. BERGEN Thank you, your Honor, for staying late.

THE COURT: You are going to have the equipment out?

MR. BERGEN: Yes.

(Whereupon, an adjournment was taken to Wednesday, April 7, 1976, at 10:00 a.m.)

(185) III



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BIG SEVEN MUSIC CORPORATION, et al., Plaintiff	Before: HON. THOMAS P. GRIESA, District Judge
vs.	
JOHN LENNON, et al., Defendants.	75 CIVIL 1116 (T.P.G.)

New York, April 7,8,14,15, 1976
April 21,26, 1976

STENOGRAPHER'S MINUTES

(185)

BIG SEVEN MUSIC CORPORATION, et al.
v.
JOHN LENNON, et al.

April 7, 1976,
10:30 A.M.

--

THE COURT: Can we go ahead? Was someone questioning Mr. Marsh?

MR. BERGEN: I am, your Honor.

MR. LARSON: Your Honor, I would like to introduce myself. I am Philip Larson, representing Hogan & Hartson. Mr. Prettyman will not be attending today, and I will be taking his place.

D A V I D M A R S H, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. BERGEN:

MR. BERGEN: Your Honor, before we start I would like to offer that exhibit in evidence. We subpoenaed Mr. Brescio, and Mr. Schurtman has agreed to stipulate that these Defendant Exhibit Q for identification are the mastering notes that Mr. Brescio used when he mastered the Roots out from the 7-1/2 IPS.

MR. SCHURTMAN: That is correct, your Honor.

THE COURT: That is very helpful.

(Defendants' Exhibit Q received in evidence.)

xx

Q Now, Mr. Marsh, when we left off last Thursday or Friday -- Thursday, I guess it was -- we had just finished playing Angel Baby. Do you recall that?

A Yes.

Q I believe you had given some testimony about your opinion as to Angel Baby. In your opinion, would Angel Baby have alienated Mr. Lennon's fans by its release?

A I think so. I mean I think that it is shoddy work, and I think in any field shoddy work affects a person's career and especially when you are dealing with a group of people whose loyalty is basically very -- can be very fickle something as obviously showed as that really calls into question the whole, you know, what's this guy doing.

Q Do you recall from the time you played the Roots album the track entitled Be My Baby?

A Yes.

Q How would you compare the Be My Baby track to Angel Baby?

THE COURT: Let me get this clear. The Be My Baby is where?

MR. BERGEN: It is on the Roots album. It is one of the two tracks along with Angel Baby that is not on the Rock and Roll album.

THE COURT: Have we played that?

MR. BERGEN: No, but we can right now.

THE COURT: All right. Let's do it.

MR. BERGEN: Your Honor, I am going to play from Plaintiffs' Exhibit 34, which is the Roots album, Be My Baby.

(Be My Baby played)

Q Mr. Marsh, is Be My Baby considered a rock and roll classic, the original recording?

A Oh, yes. It was considered probably one of the two or three most significant records that Phil Spector, who was the producer of the originals, did with the Ronettes.

THE COURT: With who?

THE WITNESS: The Ronettes.

It is considered both a production classic and a girl group vocal classic.

THE COURT: That's a girl group?

THE WITNESS: Right.

Q Can you tell us what you mean by a production classic?

A Well, in terms -- at the time that record was made, which would be about 1963, there had been a very limited use in rock and roll of orchestration, of certain kind of vocal harmony techniques, and things like that, and

Spector's use of those elements with the sort of incredible sense of dynamite on the original record, it builds just much more than that does, is what it a classic.

Q Would you tell us how this record compares to-- this track compares to Angel Baby?

A Well, again the horns and the various instruments are not in tune with one another nor with Mr. Lennon's voice, so it is not as glaring, I don't think, but in the sense that I am sure that this track was initially done, the basic track was done with Spector, in a sense to me it is more embarrassing because it is like the man trying to recreate his own work and he simply not only can't do it but he is literally incompetent. It is just incompetent. And it is very embarrassing.

Q What impact does the fact that you testified that this, the original version of Be My Baby, was a classic have on the fact that Lennon in your opinion did a bad job of recreating that?

A I think it makes him look ridiculous. It looks that not only is he not capable of recapturing the spirit of the Ronettes record, or the tone, or of reinterpreting that in an incompetent way, but it also makes him look, releasing it to the public, that he doesn't even know how incompetent it is.

Q Would you say that both of these versions, Angel Baby and Be My Baby, would be embarrassing to Lennon's reputation as an artist?

A Extremely.

Q Why?

A Well, first of all, I mean just on the basic level of sheer competence, in the same way that I wouldn't want an article of mine in which I had misspelled words and used bad grammar being distributed to the public, that would be an embarrassment to any creative person, that their work -- that their worst and least competent work should be displayed before the public, that would be embarrassing. Secondly it is embarrassing because of the association the song has with his career and its associations has with Spector's career and ~~Lennon~~ has always be one of the principal champions of Spector.

Q Is the order -- on a Rock and Roll album is the order on the tracks important? In other words, which track follows which one?

A I think it is important on any record, so it certainly is there.

Q And the order of the tracks on the Rock and Roll album and the Roots album are different,aren't they?

A Substantially different, yes.

Q And in your opinion does that make a difference in terms of the complete thing?

A It makes a difference in the way that the album flows.

Can I take a look at the two albums?

Q I am handing you Plaintiffs' Exhibit 34, which is the Rock and Roll album, and Plaintiffs' Exhibit 34, the Roots album.

THE COURT: Mr. Bergen, I know we have had this before, but is it correct that Angel Baby and Be My Baby are the only two songs that were included in the Roots that aren't included in Rock and Roll?

MR. BERGEN: That's right, your Honor.

A I don't think there is any great deal of difference. There might be some -- again, I haven't heard these records in several weeks, maybe a month, but there is a difference in the way the two records flow, but it is real hard for me to judge because those two out of tune tracks come up in the middle of these sides and that it disrupts the thing as much as anything.

Q Are any of the things that you have testified about with respect to the Roots album true of the Rock and Roll album? In other words, the quality, the sound?

A No. I mean the sound quality on the Roots

album is a very well engineered album, it is a very well produced album. Regardless of the quality of any of Mr. Lennon's interpretation, which is even more subject to taste than that.

THE COURT: Wait a minute. What are you saying?

THE WITNESS: I am saying the basic quality, the competence of the production, the engineering, and the pressing --

THE COURT: On which album?

THE WITNESS: On the Rock and Roll album. I find none of the problems I have mentioned here.

Q Now, what is your opinion of the effect on the Roots album on Mr. Lennon's reputation as an artist?

A Were it widely distributed I think that the effect could be potentially devastating. Since the Beatles also had broken up his force commercially had been splintered. He had gained and lost through a series of projects and the public is very -- I mean it is a very volative public. Sometimes in New York City he got political and the rock community tends by and large to mistrust people who are overtly political. He had been going through this entire immigration thing. People were very confused about what the status of his career was and the word was sort of out well maybe some of all this legal trouble and

Beatles trouble and one thing and another has sort of cost him his talent. And I think to come out with something like Angel Baby or Be My Baby in a package like that, which looks like not only -- I mean to me, as a rock fan what it would look like is not only doesn't he know how any more but he doesn't care any more, he can't even cover up for himself.

Q Are you talking about those songs or the total package?

A I am talking about the total package from the cover on in.

Q Now, with respect to the damage to Mr. Lennon's reputation, though there had been probably only 1500 of these albums sold, can you give an opinion?

A Well, I think --

Q The Roots album I am talking about.

MR. SCHURTMAN: Where do we get the 1500 figure; I thought it was 1270.

MR. BERGEN: Have you an exact figure?

MR. SCHURTMAN: That is the figure we have been using during the trial.

THE COURT: I can't recall what it is.

Q All right, 1270. Does it make any difference?

A I would say this, first of all you are dealing with a person whose popularity was basically dealt on word of mouth and whose popularity rises and falls on word of mouth.

Secondly, the 1270 is not a realistic figure. People play records for one another, and, particularly with anybody associated with the Beatles, people go out and bootleg records, by which I mean they make tapes or they do pressings here and there, and particularly with Be My Baby and Angel Baby, they would be eager to help them. I know I was. I think there is great chance that many more, obviously, people, over a period of time,

the effect can be significant. I won't say it necessarily would be, but there is a potential for more than that.

MR. SCHURTMAN: I object to the references as to what people might bootleg. There is no evidence that anyone did.

THE WITNESS: There is evidence that people in the past have bootlegged other Beatles or Beatle-oriented tracks of limited availability.

Q Mr. Marsh, isn't one of the things you were talking about people loan records to each other and they keep them, make tapes of them?

A Yes, you connect up a tape recorder to your stereo amplifier and your phonograph is hooked up to play the record and you tape a copy. People do that all the time.

Q Just because there are 1270 copies of a record sold doesn't mean that there are only 1270 versions of that album around? There could be more because people would copy them?

A Certainly, many more people would. People play these things for their friends; they play them at parties; that is what it is all about, anyway.

Q Now, Mr. Marsh, have you heard anything to the effect that the Roots album has become kind of a collector's

item?

A Yes, I heard that a couple of places.

MR. SCHURTMAN: I object to that.

THE COURT: Didn't somebody say that it is a collector's item? Somebody said it is a collector's item.

MR. SCHURTMAN: Two versions --

THE COURT: What do you mean about it being a collector's item? Did you hear a couple of people say it?

THE WITNESS: I heard a couple of people say it. I heard it mentioned in terms of a sort of Rock Trading Festival that was held in this hotel by Grand Central Station -- is that Commodore -- I heard it mentioned in context with that. I heard the figure $10 bandied about.

Q As a price for the Roots album?

A Yes. Also, just in general, any record by someone of John Lennon's stature would be, any record of that limited availability by someone of John Lennon's stature would become one. That is what the market is like.

MR. SCHURTMAN: If this testimony is offered for the truth of the assertion, then it is hearsay; if

it is being offered simply that he heard people say things, then I think it is irrelevant.

THE COURT: I think it is almost a question of opinion.

Are you familiar with the production of a limited number of albums available? Does that happen for one reason or another?

THE WITNESS: Yes.

THE COURT: And then are you familiar with the course of events as to such a limited album; what happens to it?

A Well, the most standard kind of example would be the record that is not a hit, like all blues records that were maybe hits in the blues market, which was very exclusively black market in the '30s, say a thousand copies were pressed. 20 years later with the advent of the Beatles and Rollin' Stones in the '60s, you had many, many people wanting to find these blues records, and more serious collectors, obviously. It is simply supply and demand; it is the most elementary level; people pay hundreds and thousands of dollars for rock and roll or rhythm and blue records under those circumstances.

THE COURT: That is not quite our circumstance. All I know is that this record by John Lennon, the 1270

was sold, and I probably can make a judgment. It is just a matter of evidence.

THE WITNESS: There is a circumstance in the career of the Beatles. There was an album called Yesterday and Today, which originally showed the band chopping meat and dolls' heads on a chopping block.

THE COURT: You mean the cover?

THE WITNESS: Yes, that was the cover. A Capitol pull-back cover was substituted with an ordinary picture of the group, but not before a few copies got out. I don't know how many, but a very limited number. I have personally seen that record selling, again at a Beatles' Trading Festival at the Commodore, for a hundred dollars, and that would be a similar circumstance, I think, because that is simply buying it for the cover alone.

THE COURT: Let us go to something else.

Q Mr. Marsh, I show you Plaintiffs' Exhibit 34, which is the record jacket of the Roots album.

Now, would you comment with respect to the credits on the back of the album?

A It is unheard of for an artist to credit himself as the singer or performer after every track. This John Lennon here (indicating), that space is always used, when it is used, to indicate the author of the

track. I think that could be really confusing, or, again, embarrassing to John Lennon. It makes it look as though he wrote Rip It Up. Everybody knows he did not write that song on here, Sweet Little Sixteen, that Chuck Berry wrote it.

Q You say because John Lennon's name appears after each track on the Roots album there would be confusion that people would think that Mr. Lennon was trying to say that he wrote the songs?

A I am saying that there is that possibility, and given that we are dealing in part with an audience who knows about the '50s music because they simply were not around then, it is possible to mislead them, and then if they found out if they had been misled or thought they had been misled --

THE COURT: There is no indication of the composer or author on here.

THE WITNESS: No, that struck me as strange, too, because rock and roll is the writer's medium and you give credit to the man who wrote the song.

THE COURT: What would the normal credit be? What would be said here?

THE WITNESS: Well, in the case of Sweet Little Sixteen, which is a song and I know the author

of it, this would say Sweet Little Sixteen, Chuck Berry.

MR. BERGEN: Maybe I can show him Exhibit 35, the Rock and Roll album.

Q Explain to the Court in a little more detail what you mean?

A Well, it is the standard form of citation for all the songs written by one person. Generally at the bottom it would say All Songs by John Lennon, Copyright, and whatever, and the publishing company. Here if you would like to look at this, this shows the author of the songs, the publishing company, the performance rights, and the tracks, a convenience for the radio or air play.

Q You are referring now to the Rock and Roll album?

A To the citations after the titles on the back.

MR. SCHURTMAN: What is the relevance of radio play?

THE WITNESS: I was trying to explain why the various bits of information are given.

THE COURT: Do we have the right word here? Is Chuck Berry the composer or writer or author or what do you call him?

THE WITNESS: The songwriter.

Q Now, looking again at the Roots album, Exhibit 34, do you have a comment with respect to Track 5 on Side 1, Rip It Up and Track 4 on Side 2, Slippin' & Slidin'?

A It says Rip It Up and it says Slippin' & Slidin'.

No, it is not Slippin' & Slidin'.

Q Send Me Some Lovin'?

A On Side 1, Track 5, on the Roots album, Rit It Up, and it should be Rit It Up with a song called Ready Teddy, two songs which were performed in their original versions by the same artist, Little Richard.

THE COURT: What are you saying, that the label there on the Roots album says Ri. It Up?

THE WITNESS: Right. It does not indicate there is another song in a medley with that called, I think, Ready Teddy.

Similarly, on Track 3 on Side 2, Bring It On Home To Me is not just Bring It On Home To Me, it is also a song called Send Me Some Lovin'. Both songs were done by the same artist, Sam Cook.

Q In your opinion what is the effect of not giving credit to Ready Teddy and Send Me Some Lovin'?

A Well, I mean it contributes to the overall shoddiness of the venture and is potentially -- my question

is if I had only the record in my hand, why didn't John take any more care than that? Doesn't he care any more?

THE COURT: How is it listed on rock and roll?

THE WITNESS: Listed as medleys Ready Teddy, Rip It Up, and the medley Bring It On Home To Me, Send Me Some Lovin'.

Q Now, looking at the cover itself, Mr. Marsh?

A Front?

Q The front cover, can you comment with respect to the cover?

A People just don't do covers like that. I mean, because I know something about journalism and printing, I am aware that this picture is not from an original photograph. I mean, the colors are nothing less than garish. It looks thrown together.

Q Were the Beatles a group known for having interesting covers on the albums?

A Yes, one of the first groups in rock and roll to sort of raise album cover art to the point where design societies now publish books about album cover art, and the Beatles really initiated that.

Q Do you have any comment also with respect to the lack of a sleeve for the album?

Will you describe to the Court what the sleeve is?

A The sleeve is the white paper insert.

Q And there is no sleeve in the Roots album?

A There is no sleeve in the Roots copy, that is, the copy I saw.

MR. SCHURTMAN: You say there is no sleeve in the album? There is a sleeve in mine.

MR. BERGEN: There is none in the one that has been marked.

MR. SCHURTMAN: Maybe somebody took it off.

MR. BERGEN: Maybe this is the sleeve (indicating).

It is a minor point.

MR. SCHURTMAN: Will you withdraw the sleeve issue?

MR. BERGEN: Yes.

Q Handing you the two record albums, can you comment about the vinyl on the records themselves, the vinyl that the record is made of?

A I will have to compare them. Well, you should perhaps see for yourself, your Honor, but as with the copies that I compared in my office, the Rock and Roll is shinier, which generally would indicate that it is

made from virgin vinyl, which is to say not recycled vinyl, and it is much less brittle, which is, again, some kind of test of quality control in the actual production of the disc itself.

(Continued on next page.)

T3

Q Can you also comment, Mr. Marsh, about the advertising for other albums on the back of the record, the Roots record?

A Well, again, it just contributes, you know, to the idea that -- I mean it just further destroys the credibility of the project. I mean it is not done. I mean there is a sort of protocol, a sort of good form, bad form situation that is, you know, ethic or something that is developed and you just don't do that. This was done before the Beatles -- something like this might have been done by a record company with the artists of their albums. They might have said "Other albums by Chuck Berry available on Chess Records are," and it might have shown the covers very small like this, but it certainly -- I mean people like pictures of artists and such, and they would really expect some kind of esthetic continuity from someone like John Lennon. I would. I do.

Q Do you recall hearing about the Roots album when it first came out?

A Yes.

Q How did you hear about it?

A In the most confusing sorts of way. I remember reading trade papers, one thing and another. One week there is a record that is going to be his -- what I thought

of then as his oldies record, going to be marketed only through TV. Then in the trade papers the next week there is something about this injunction, that injunction, and then the Rock and Roll album. For a while I thought there was only one record.

MR. SCHURTMAN: If the witness is going to refer to trade papers could we see them?

THE COURT: Let's take one thing at a time. Could I have the last answer read slowly?

Q Mr. Marsh, were you confused as to what the situation was, whether there were two records or one record?

A I remember that Capitol had sent me the Lennon album as a reviewer, and I was sort of wishing that I would see the TV commercial so I would know where to find these other songs that he had also done.

Q Did you think at one point there were two record albums?

A First I thought there was only one. Then somehow I got the idea there were two, even at the point after I already had the Rock and Roll album, that there were two different records.

Q Did you hear generally in the industry that there was confusion as to the Roots album?

A I remember asking people questions. The situation

was cloudy in my mind until the coverage of the first trial.

MR. SCHURTMAN: I object to the testimony about he asked a couple of unidentified people.

THE COURT: I don't think this is hearsay. Here is one man connected with this business, and he says what he did and heard.

MR. SCHURTMAN: My objection is to the looseness of the testimony -- well, I talked to a couple of people.

Who are the couple of people that he talked to, when, and where.

THE COURT: If you want him to be more specific, fine.

Q Do you recall who you spoke to?

A I talked to -- the one person I remember for certain talking to is a friend of mine who lives in California named Greil Marcus who is also a music critic who writes for the Village Voice and Rolling Stone. He is a big John Lennon fan. I remember it coming up in a conversation, and I walked away from that conversation as confused. Maybe he knew but I didn't understand. That's the one I remember for certain. Possibly also with my friend John Landau.

Q Who is Mr. Landau?

A The records editor of Rolling Stone before me.

Q He is a rock music critic?

A Yes, and a record producer.

Q Mr. Marsh, I show you Plaintiffs' Exhibit 201, which is the Rolling Stone issue of May 22, 1975. I ask you if you have ever read the review by John Landau of the Rock and Roll album?

A Several times.

Q Do you agree with Mr. Landau's criticism of the Rock and Roll album?

A In part.

MR. SCHURTMAN: I object to this as irrelevant.

THE COURT: Overruled.

Q Can you tell us how you disagree with Mr. Landau?

A Can I just scan this?

(Pause)

How I disagree?

Q Yes.

THE COURT: This is an exhibit, isn't it?

MR. BERGEN: Yes, your Honor, 201.

MR. SCHURTMAN: May I ask what the relevance of this is, for what purpose it is being offered? This was a review published in a newspaper which was circulated to 450,000 people. We now get another editor from the

same magazine who is going to tell us he disagrees with it. What's the point of it? He may disagree with it but what bearing does it have on this case? That is what I am trying to find out.

THE COURT: I think it is relevant. We are trying to form some kind of judgment as to the intrinsic quality of the album, and one of your arguments is, and a very important question, is whether the sales were influenced by the intrinsic quality or were they influenced by confusion in the market or bad marketing resources, and so forth. Now, anybody who can come in -- and I don't think we are going to have hundreds of thousands of these people -- but anybody who can come in and give testimony about what he or she thinks about the album I can't say it is irrelevant.

MR. SCHURTMAN: We can take his opinion of what he thinks for whatever it is worth.

THE COURT: That's all he is doing.

MR. SCHURTMAN: He is impeaching a review in his own magazine, and the review was published and the public never learned this gentleman's views.

THE COURT: That is not the question.

MR. SCHURTMAN: If he is offering it solely for the purpose of giving his opinion, that's fine.

THE COURT: I think that's it, isn't it?

MR. SCHURTMAN: I don't know.

MR. BERGEN: Yes, it is.

THE COURT: I think we understand each other.

THE WITNESS: Then I should say I am a little hesitant about saying anything about this because this is my best friend writing. On the other hand, I disagree about specifics in the review. In other words, I think--

THE COURT: You better let me read the review.

THE WITNESS: I had to reread it.

THE COURT: Why don't you wait a second.

THE WITNESS: I don't want to go into detail by saying this song is good, that song is good. To me, as a person a couple of years younger and didn't experience the originals of some of these songs quite as directly as John did, John Landau did, or John Lennon did, that some of the songs seem much more admirable to me, and in terms of the tone this review seemed much more successful to me than it did to him. He doesn't mention, for instance, Peggy Sue and Stand By Me. I don't think he mentions Peggy Sue, which to me, I think they are great, right up there with anything John ever did. That's what I disagree with about the review.

MR. BERGEN: I have no further questions of Mr.

Marsh, but I just wanted to know whether your Honor had any specific reason for asking us to bring the sound equipment back while Mr. Marsh was here.

THE COURT: I had a feeling that it just might be well. I don't have anything in particular. I think during the time we have, in view of all the testimony, I think it would probably help me, if I can get the time, to hear the Rock and Roll album all the way through, because I don't think I have ever heard it all the way through, and that's the ultimate, you know, one of the ultimate questions.

So I appreciate having it here, but I don't have anything right at the moment.

MR. BERGEN: Fine.

THE COURT: All right. Cross-examine.

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Marsh, turning first to John Landau's review of Rock and Roll, what was Mr. John Landau at Rolling Stone at the time he made the review?

A He was the associate editor in charge of the record section, and that was all John did at Rolling Stone. When I took the job it was much expanded.

Q It was what?

A It was expanded. When I took that job after he left it was expanded..

Q Were you employed by Rolling Stone Magazine at the time he wrote that review?

A No, I wasn't. I freelanced for them occasionally. In fact, I think that if you look on the page in the original there I am identified on that page at the end of a review as music critic for Newsday.

Q You mentioned that you had a friend out in California named Greil Marcus?

A Right.

Q Has Greil Marcus written reviews for the Village Voice?

A Yes.

Q Who is Greil Marcus? Is it a he or she?

A It is a man who also once had the Rolling Stone record review job. He used to write for a paper callled The Good Times in San Francisco, he taught at the University of California at Berkeley, and has written for a number of other people including currently the Rolling Stone and The New Yorker and The New York Times book review.

Q Is Mr. Marcus an established and well recognized rock and roll critic?

A Yes.

mdh 9 Marsh-cross

MR. BERGEN: I object. Mr. Schurtman is about to do the exact thing he objected to me doing.

THE COURT: Let him do it.

When did you become employed with the Rolling Stone?

THE WITNESS: With the magazine, in June of 1975.

THE COURT: And back in February and March of 1975, what were you doing?

THE WITNESS: I was employed at Newsday, a Long Island daily, as a music critic.

MR. BERGEN: I think on page 66 of the Rolling Stone Magazine, Plaintiffs' Exhibit 201, Mr. Marsh's name appears as the music critic of Newsday on another review on the same page as the Rock and Roll album.

THE COURT: I think he said that.

Q I think my last question to you was whether Mr. Greil Marcus is a well known, well established rock and roll critic?

A Yes, he is.

Q And is he favorably considered in the business, in the industry?

A Yes.

Q He is well regarded?

A Yes.

Q Can you tell us what kind of a paper the Village Voice is?

A Somewhat similar to Rolling Stone although it is local rather than national. Its orientation is to, I suppose, left politics and the counter culture.

Q Is it read by many, shall we say teenagers and people in their early twenties in New York City?

A Yes.

Q Are you familiar with the review which has been marked as Plaintiffs' Exhibit 200 which was published in the Village Voice of Monday, March 10, 1975, by your friend Mr. Greil Marcus?

A Yes. That's how I came to have -- these two reviews are how Greil and John and I came to talk about the record.

Q Perhaps before I question you about it I could ask the court to look at that review.

THE COURT: When you say it is how you came to talk to who about the record?

THE WITNESS: We were all listening to it, writing about the record at the same time, and not that the three of us, because we are friends, write consensus reviews, because obviously in this case we did not, but it was an issue. I think Greil was in town about that time, and

Landau lives here, so the three of us had a conversation about the record.

MR. SCHURTMAN: Let me ask the Court to read the review and I want to ask you some questions about it.

(Pause)

Q Did you yourself write a review of Rock and Roll?

A I may have written a very, very brief one for Newsday.

Q Do you have it with you?

A No, I don't.

Q Do you remember whether it was favorable or unfavorable?

A Mixed. Let me explain something. I reviewed the music rather than Mr. Lennon's intentions. I thought some of the music was successful and some of the music was not successful.

Q Could I ask you to furnish us with a copy of that review? Do you have one?

A Somewhere. I can find it.

Q Either that or tell me the issue of Newsday and we will get a copy.

A I don't have any idea in what issue, because I was writing virtually every day.

Q Do you keep copies of the stuff you write?

A I do keep copies but they are in boxes about as high as this (indicating).

Q I suggest to you since you are now testifying as an expert on Rock and Roll we would like to see your review of Rock and Roll to see what you said at the time?

A I just want to make it clear that it is probably no more than three sentences.

Q I don't care what it is. I want to see it, and I think it should be made available to the court.

THE COURT: You try to find it.

THE WITNESS: Yes.

MR. SCHURTMAN: May I ask for a direction of the Court to make sure we get it?

THE COURT: Yes.

MR. SCHURTMAN: I will offer it as an exhibit whenever we get it.

THE COURT: All right.

Q You mentioned a discussion with John Landau and Greil Marcus the two people who wrote the long reviews of Rock and Roll?

A Yes.

Q Can we fix the date of that discussion. Was that before they wrote --

A After the Rock and Roll album came out. Not long after.

Q Do you know if it was before they wrote their reviews or afterwards?

A I think it was -- and I am not certain of the dates-- I am certain of the dates these reviews came out. I think it was after Greil's and before John's because I remember John saying something to me at some point I really want to write about this record but I don't know if I can, you know, I think Greil said everything that needs to be said. Something like that.

Q John said that Greil's review --

A That Greil in his review had said everything that needed to be said.

Q But then John went ahead and wrote the review anyway?

A There was a certain standard of coverage that Rolling Stone is expected to keep up, and I also said at that point I believe that John hadn't written about -- I mean Greil hadn't written about Stand By Me or Peggy Sue.

Q At the time you had that discussion with Greil Marcus and John Landau, do you know whether any of you had heard the Roots album?

A I know I had not. I don't think they had.

Q Youhad not?

A One of them might have seen a TV commercial but I am not certain.

Q Had you seen the TV commercial?

A No.

Q Have you ever seen the TV commercial?

A No.

Q When was the first time you heard Roots?

THE COURT: You are saying you had heard Roots by this time?

THE WITNESS: No. I had not heard Roots until about a month ago, as I said Friday.

THE COURT: Let's get this straight.

Q The sequence, as I understand it, is you never saw the Roots commercial at all. The first time you heard the Roots album was a month ago, presumably when Mr. Lennon's lawyers got in touch with you, is that correct?

A Yes.

Q And as far as you know when you met with John Landau and Greil Marcus, which must have been around February, March, of 1975, in that period --

MR. BERGEN: Objection. He says he doesn't know when it was.

A I know it was in that period, yes.

THE COURT: That's pretty limited. Overruled.

Q During that period of time let me ask you the question again so we can be clear on it. Did either of these gentlemen tell you that they had heard Roots?

A No. To the best of my knowledge neither one of them had heard Roots, but that's only to the best of my knowledge.

Q Fine. Now, if Roots is indeed such a bootleg item and collector's item as you think it might be, and that's caused such a furor, do you find it surprising that until a month ago you had never even heard the Roots album?

MR. BERGEN: Objection. I don't think there is any testimony by Mr. Marsh about it causing a furor. Mr. Schurtman is elaborating.

MR. SCHURTMAN: I am paraphrasing.

THE COURT: We know what his testimony is. I will overrule the objection.

A Do I find it surprising that I never heard it?

Q That nobody ever brought this bootleg item to you and said hey, listen to that.

A No, I don't find it terribly surprising because I am not terribly known as one of Lennon's critical

champions, as a matter of fact.

Q But you are very much in touch with the rock and roll scene in your job and in your work?

A With certain parts of it, yes.

Q And if this were an item that caused general revulsion and interest or anything of that type isn't it likely someone would at least have called it to your attention?

A Someone did eventually.

Q Yes, a month ago?

A Yes.

Q When the lawyer spoke to you?

THE COURT: Wait a minute. You heard about -- didn't you say earlier you had heard about Roots?

THE WITNESS: Sure.

THE COURT: Back in February and March.

THE WITNESS: Sure. I knew that there was some confusion, and it was not clear to me until I read reports I believe in Rolling Stone, but I might have read it elsewhere as well, of the first -- of these suits. I wasn't really clear as to the sequence of events. It was very confusing.

THE COURT: Were the lawsuits reported in Rolling Stone?

THE WITNESS: This trial was.

MR. SCHURTMAN: But that's the present lawsuit.

THE COURT: In other words, articles about the lawsuits, do you know when they would have come out? What I am talking about is whether they came out recently or --

THE WITNESS: Recently.

THE COURT: And you are saying until then you didn't really know what the true status was?

THE WITNESS: Yes. I mean until then it was never clear to me whether it was two completely different albums or not.

MR. SCHURTMAN: Let's see if we can pinpoint the date. I happen to have the Rolling Stone article here, and as long as you brought it up let's offer it in evidence. It is Rolling Stone issue of April 8, 1976.

Why don't we have that marked? I am not offering it for the truth of its contents, your Honor.

(Plaintiffs' Exhibit 280 marked for identification.)

xx

MR. SCHURTMAN: May we put it in evidence? Do you object to it? Have you seen it? I am sure you have.

MR. BERGEN: Yes, I have seen it.

THE COURT: I will receive it.

xx

(Plaintiffs' Exhibit 280 received in evidence.)

Q I show you the article from Rolling Stone of April 8, 1976. Is this the article you just referred t·

A Yes.

Q Who is Mr. Chet Fli[illegible], who wrote the article?

A He is the New York borough chief.

Q Did you have anything to do with the publication of this article or creation?

A I think Chet asked me to read it in his first draft and I suggested that rather -- I mean he had had some description and I suggested he go with the quote that's there, but I could even be wrong about that.

Q When he spoke to you had you already agreed to testify as an expert in this trial?

A No.

THE COURT: Let me see that, please.

THE WITNESS: I think that was already out at the time I was asked. I think it came out the day I was asked, as a matter of fact.

Q Using this article of April 8, 1976, as one point of reference in terms of time, and using February 8th or February 9th, 1975, as the other point of reference, during that period can you tell us when you first heard about the Roots album?

A Before February. No, I mean -- I heard about it

whenever there was something in Billboard or Record World or Cashbox about the record. I don't know when it was.

Q Do you remember specifically what it was you read in Billboard, Record World and Cashbox about this album?

A Not specifically.

Q You said you remembered having read something about injunctions. If I were to tell you there was no injunction proceeding would that refresh your recollection?

A No, because I just meant, you know, I read something about legal trouble; or heard something about legal trouble.

THE COURT: We will take a recess.

(Recess)

MR. SCHURTMAN: Before I proceed to question the witness about the last exhibit, I would like to make a representation to the Court.

On January 26, 1976, I received a telephone call from Mr. Chet Flippo, the gentleman who wrote that article, the April 6th issue, and he wanted to interview me. I told him I was not prepared to comment on a pending case in court and I took the precaution of dictating a memo to the file about my conversation with Mr. Flippo. I told him that if he wanted to learn what the case was about he could go to the Court House and gain access to the transcript. I simply want to assure the Court that I had nothing to do with the publication of that article or any other article.

As your Honor knows, there were some earlier articles in the New York Post and an item in the New York Times.

THE COURT: I never conceived of such a thing.

MR. SCHURTMAN: The only thing I find disturbing is apparently Mr. Lennon was interviewed for the last article and --

MR. BERGEN: I don't think there is any evidence that Mr. Lennon was interviewed for the last

article, and even if he were, it doesn't make any difference.

MR. SCHURTMAN: It quotes Mr. Lennon directly.

MR. BERGEN: That does not mean he was interviewed. People get quoted all the time and they are never interviewed.

MR. SCHURTMAN: I simply wanted to clarify that point.

THE COURT: I don't see any impropriety in what anybody did.

BY MR. SCHURTMAN:

Q Now, do you know of any significant reviews -- and when I say significant I mean in journals of wide publication -- of the Rock and Roll album that was favorable to rock and roll?

A No.

Q Are you familiar with a magazine called High Fidelity?

A Not terribly familiar. I know what it is.

Q Let me show you Plaintiffs' Exhibit 253, which is the June, 1975, issue of High Fidelity and Muscial America.

Have you seen that issue?

A No, I have not.

THE COURT: What is the exhibit number?

MR. SCHURTMAN: 253 for identification, a review of John Lennon's rock and roll appears on page 112.

THE COURT: What is the day again?

MR. SCHURTMAN: June, 1975.

I would like to offer the review in evidence.

THE COURT: Any objection?

MR. BERGEN: I have not seen it.

MR. McHUGH: I object.

MR. SCHURTMAN: I would like to offer the review in evidence.

MR. BERGEN: No objection.

MR. McHUGH: The objection that we have is simply it is cumulative and I am not sure for what purpose it is being offered, but there is no identification of who the reviewer is, what the nature of this magazine is, what the circulation is. I don't see any relevance.

THE COURT: I will overrule that objection.

All right, I have seen this.

MR. LARSON: I also object. If this is being offered for the truth of the assertions in here, I believe it is hearsay.

THE COURT: It will be received.

(Plaintiffs' Exhibit 253 was received in evidence.)

Q Mr. Marsh, I have shown you this review. Would you happen to know who M.J. is?

A I have no idea.

Q Referring specifically to the part about --

THE COURT: You are talking about the High Fidelity review?

MR. SCHURTMAN: I am talking about M.J., the initials of the reviewer. The magazine speaks for itself.

Q The reviewer said that:

"His run-through of fourteen 1950s rock and roll tunes is superficial, unfelt, seems downright sloppy. The vocals are so far back in the instrumental soup that half the time one can't tell what song he's singing. Phil Spector is known for confused productions, but this is ridiculous."

Now, this is not a review of Roots; this is a review of Rock and Roll. Do you review with any portion of this review?

A Not with any of the portions you just read, no, sir.

Q Do you agree with any aspect of the review?

A No, I don't agree.

THE COURT: You said a minute ago, I think, that you thought some of the songs on Rock and Roll were successful and some were not so successful, something like that.

THE WITNESS: Some of the interpretation of the songs. That would be clearer.

THE COURT: Whatever you meant to say.

THE WITNESS: That is what I mean.

THE COURT: Let me just start again.

What would your evaluation then be of the Rock and Roll album? Spell it out in as much detail as you wish.

THE WITNESS: It is a mixed success to me artistically, because I think Lennon overreaches. I don't think the two Chuck Berry songs, Sweet Little Sixteen and You Can't Catch Me are done in a way that to me expands their emotional meaning or historical signifi-

cance or make it clear to me why Lennon would choose to do them in such a way.

On the other hand, Stand By Me and Peggy Sue did exactly that, expand the songs emotionally.

THE COURT: The Berry songs are which?

THE WITNESS: You Can't Catch Me and Sweet Little Sixteen.

THE COURT: Now, then, the two others that you mentioned --

THE WITNESS: Peggy Sue and Stand By Me are very difficult songs.

THE COURT: What do they do?

THE WITNESS: I think that they expand -- I am speaking in terms of comparing Lennon's to to the original -- they expand the feeling in new ways, and to really feel John Lennon's affection for those songs and the people who made them and they helped shape his art in new ways.

THE COURT: Any other comments on the album generally or on individual songs?

THE WITNESS: I think the album in terms of the song selections -- and there are many reasons offered for that here -- I think that the song selection is overly conservative. I think that John picked relatively

obvious songs. Had he been able to come up with acceptable versions of Angel Baby or Be My Baby, had those songs been properly performed, my judgment would be significantly altered.

THE COURT: Read the last answer.

(Answer read.)

THE COURT: Do you know enough about the sales of this type of album to give me an opinion as to whether these factors would affect the sale of the album?

THE WITNESS: The facts I just mentioned?

THE COURT: Yes. What I am asking is this: You are a reviewer, and I take it that means you are not just an ordinary consumer?

THE WITNESS: Yes, sir.

THE COURT: The opinion you have given me is your own opinion as reviewer?

THE WITNESS: Exactly.

Q Now I want to know if you know enough about the salabiiity of an album like this to know, to be able to have an opinion as to whether these factors or any other factors would affect the sale of the album? Do you understand my question?

THE WITNESS: Whether the song selections and things like that would have an effect, the quality of the

various interpretations, would it affect the sale?

THE COURT: Yes, the factors that you chose to mention to me.

THE WITNESS: Yes, to an extent they would affect the sale.

THE COURT: How would they affect the sale?

THE WITNESS: Well, I would say that except when he does something as outrageous as the Some Time In New York City, based on the testimony that I heard sitting here from the final Capitol witness, Lennon has a basic audience of about half a million --

THE COURT: No, no --

THE WITNESS: What I wish to say, Lennon has a basic audience, and if he comes up with something that really reaches people, he can't help but triple his sales. Lacking something really exceptional, he will enjoy relatively ordinary sales. My understanding was --

THE COURT: Wait a minute. I want your views. I don't want you to give us the views of some other witness.

Now, let us go back: I want you to start over again. Don't give me the testimony of another witness, but maybe there is some help you can give me. I don't mean specific numbers.

THE WITNESS: It is clear to me that an artist has a basic quality and after he has been around and established a career, he has a basic audience that buys pretty much everything he does that is meant to be a commercial record.

THE COURT: Now, go ahead.

THE WITNESS: If he comes up with something that is really esceptional, and it can only be exceptional in terms of the fact that it is exceptionally useful to be played on a radio and attract people in this way more than ordinary, then he will sell more records. I don't think that artistic questions are directly felt by consumers, and I think that is borne out by my experience as a reviewer or critic, that readers do not really agree with us as a group, and that some of the most widely panned sell the most records, to judge from their trade charts.

Now, talking about these reviews by Marcus and Landau, there is a grain of truth in them for people who are utterly crazy about John Lennon, real John Lennon fans. Both Marcus and Landau are that more than myself. But the mail that we got from Lennon fans when our review came out -- when did the Rolling Stone review come out? In March?

MR. BERGEN: It was in May, I think.

THE COURT: Wait. Let us get it.

MR. LARSON: May 22.

THE WITNESS: I remember at that time being impressed by the amount of reader response we got from that and how favorable to the album it was, how people were saying this is a great record, the people who write letters.

Now, that is my basic contact with the rock consumer.

What I am trying to say is, I think the reasons why rock records sell -- some do and some don't for better or worse -- given the minimal standard of quality and the lack of alienated content, is pretty mysterious to everyone concerned. But I do think if John had come up with a hit single on that record, he obviously would have sold more records, and the way to come out with a hit single, my argument to him, the way you come up with a hit single is 4to choose a song you don't hear every day.

THE COURT: Let us take the comparison between an album of John Lennon's own songs, like Walls and Bridges -- do you remember that --

THE WITNESS: Yes.

THE COURT: -- and then we know what Rock and Roll is.

Now, aside from just a critical appraisal, do you have any opinion as to whether under normal circumstances the Rock and Roll would sell as well as the Walls and Bridges?

THE WITNESS: I think the idea is intrinsically more commercial because people can relate to familiar material more easily than unfamiliar material. But there is an advantage in it, that if you see that one of the songs on a record is Rip It Up and you know that song, then you will be more interested in this than if the name of the song is Mind Games, and you never heard that song. So I think it is intrinsically more commercial. On the other hand, there is a part of the rock audience wich is very overtly and ostentaciously and pretentionally arty, I mean, very self-consciously so, and often very falsely so, and their attitude to that, "Well, he is just doing the old stuff; I want to wait until he does something new."

That goes both ways. But I think the general feeling, "Gee, it is John Lennon singing all these songs. I think there is something intrinsically attractive about that. If people hear it on radio and don't like it,

then it has a different effect.

THE COURT: You mentioned a couple of times radio. Now, what is the importance of radio? What happens with a new record, usually?

THE WITNESS: What happens with a new record on radio?

THE COURT: Yes? Is radio so important?

THE WITNESS: Radio is a crucial factor in selling records.

THE COURT: What usually happens on radio with a new album?

THE WITNESS: With an artist of John Lennon's stature?

THE COURT: Yes.

THE WITNESS: It gets played like crazy. You are going to hear it, depending on the album and how accessible it is to radio people, if it is not political, about Attica -- you are going to hear it as much as once an hour or at least a couple of times a day in the first week or two.

THE COURT: In the first week or two you hear one song about every hour?

THE WITNESS: Anywhere from every hour to every few hours. If it is the right kind of an album

you literally would hear it, once an hour.

THE COURT: On the same station?

THE WITNESS: Sure. I am thinking about FM radio, because AM radio is a different game.

THE COURT: The people who buy this will be listening to those stations?

THE WITNESS: Oh, sure, I think that the average consumer, who is not in the position I am, for I get records through review for free, I get everything -- the average consumer uses the radio as his sampling device. Records are not played in record shops any more; record shops won't play records for you any more. You can't sample them. So radio becomes the great sampling device in America for people to make their selection of records.

Q Somebody is deciding what records to play?

A Yes.

THE COURT: Now, are you able to tell me how this is done? Is it done through the record company promoting and doing a campaign to get the disc jockeys interested? Or do the disc jockeys as a matter of routine just play and make their own decision regardless of a record company's program? Do you know? I am not asking you to testify to things you don't know.

THE WITNESS: Well, I worked around radio and I worked with disc jockeys; I know a lot of disc jockeys; I know a lot of people in the music business. Record companies do their best to promote, particularly with new acts, but with a record by someone like John Lennon, they will screen it for offensive content, because John has used words not allowable for broadcasting. And then I am certain that they will begin to play it if there is no objectionable language, or if it is musical and does not have car crash noises. Then they will begin to play it. I think it is automatic, because they know people want to hear it, and what they are interested in doing is attracting listeners to their stations.

THE COURT: Would that be affected by the kind of reviews expressed by these reviewers? Would a disc jockey not play it because he thought that some of the tracks were not good interpretations?

THE WITNESS: Disc jockeys tend to have different standards. I don't think it would affect disc jockeys.

THE COURT: Now, let us assume that the John Lennon album gets this kind of playing on the radio. Now, the factors that you mentioned or that appear in the reviews, whatever would come to a listener, would that

affect the sales or is the public just going to automatically buy John Lennon?

THE WITNESS: It would affect the sales. What would have affected the sales in a positive way in my opinion is if Lennon had done things that he didn't do -- I mean, I don't know how to prove a negative; I don't know how to prove that if he had managed to come up with -- and I am not suggesting that he should have put out that version of Angel Baby or that version of Be My Baby --but if he had come up with songs that are strange, that the ordinary person would not put on there, then I think, yes, it would have been more attractive, because it would have the element of surprise and the idea that you are getting a treat, I mean, on the purely most emotional kind of thoughtless level.

THE COURT: That would make a difference in the sales? That would make a difference to the consumer who would be buying these albums?

THE WITNESS: Sure. What I am trying to say is that that is what the critics do. I think that when you write a negative view, what you are really doing is articulating someone else's visceral negative response that they have in the thought, what you are doing, you are articulating the reasons why someone is

not buying a record.

THE COURT: Let me ask you this -- again I want to caution you, if you don't know the answer to my question, tell me you don't know, and if you can, why answer it:

Now, things like the shirts, posters, other promotional materials, do you have any judgment or opinion as to how important they are in the selling of an album, like a John Lennon album?

THE WITNESS: They are important in that they create a certain kind of word of mouth, which is how sometimes even a record company itself is suprised, because word of mouth is so important, word of mouth is incredibly good, and a record company is projecting even without air play, radio air play.

Phoebe Snow would be a good example. If there is word of mouth, if people see someone in a performance, if someone hears a record played in a shop, if someone hears a record on the radio, all of this is designed to create word of mouth, and, obviously, posters and things like that help. It reminds you that John Lennon has a record. And, more importantly, it reminds the people who get the shirts and posters and so on, it reminds the retailers, the critics and radio people.

MR. SCHURTMAN: Your Honor, just one questio- of anyone here:

Who gets the shirts? That was not made clear to me. Is it the consumer or the salesman?

THE WITNESS: They go to the retailers, the critics, the wholesalers, the disc jockeys.

THE COURT: You go ahead, Mr. Schurtman.

BY MR. SCHURTMAN:

Q In the first place, I think you just testified to the fact that creditable reviews are not terribly significant?

A In terms of sales.

Q As far as consumers are concerned?

A Yes.

Q They are or they are not?

A They are not.

Q Well, last week you testified at page 3211, and Mr. Bergen asked you the question:

"Q Can you tell us briefly the importance of rock music criticism?

"A Well, I think it serves a couple of functions. First of all, as a sort of consumer guide function."

A Yes.

Q Are you withdrawing that statement?

A It does serve as a consumer guide function for a very limited constituency. A consumer guide function is often ignored, but it is, nonetheless, the intention, and, again, I was speaking in an idealized sense, and as I say, I think that the consumer guide function --

THE COURT: Why don't you read the rest of his answer?

"Well, I think it serves a couple of functions. First of all, as sort of consumer guide function, in order to both alert people to records of quality that they might overlook because they are not being paid on the radio, and it also serves, I think, to raise interesting questions about the music itself, which since the Beatles has become more and more accepted as an art form. Therefore, in one way it operates strictly as a reviewing medium; in another way it operates in the tradition of art criticism in more accepted fields."

Now, the part I am focusing on is your testimony that it operates on one level as a reviewing medium, it is supposed to communicate something to your 450,000 readers, and if you say the people are not even listening, why are you writing this stuff?

MR. BERGEN: Objection. He is arguing.

A I will answer it. I am doing it because the consumer guide function is much less important to me than the art criticism function. I am well aware after doing it for eight years people don't listen to that level.

Q Why does the magazine publish it? Aren't they interested in increasing circulation?

A The magazine publishes it because there is a limited constituency of people who are interested in reading it, and there are people in the music business who can use the favorable review as a promotional device, and I suppose that is why the music industry supports rock and roll. And the 450,000 readers in terms of the whole marketplace is not such a huge number.

Q There is word of mouth discussion between readers, too?

A Sure.

Q Well, let me ask you this:

Are you telling the Court that if a review is favorable it will enhance sales, but if it is not favorable it will not decrease sales?

A Yes, I am saying that exactly in a way. I am saying if a review is favorable it may enhance sales, not that it will, but that it has no negative effect, hardly ever, except perhaps over a very long period of time. It will never create an immediate drop-off in sales, not in this country.

Q Has Rolling Stone Magazine ever made any studies or surveys of the co-relation between its reviews and consumer purchases?

A Scientifically speaking, not to the best of my knowledge.

Q You mentioned in your testimony to the Court a few minutes ago something about trade charts. What are trade charts?

A The charts of the 100 top selling albums and singles in Billboard, Record World and Cashbox Magazines.

Q What is the function of these charts in the music industry?

A To indicate the relative commercial success of the respective records.

Q And if a record climbs to the top 20 on the

Billboard chart, say, three or four weeks after it has been released, is that an indication of at least in its early stages it is doing well?

A It depends on what you mean by well. I meawn, if it is getting a lot of air play does not necessarily mean it is getting a lot of sales.

Q It could mean that it is getting a lot of air play?

A Yes, it could also mean it is getting a lot of sales; it could be a combination.

Q It could be both?

A It can be both.

THE COURT: Doesn't the Top 20 refer to sales?

THE WITNESS: As a matter of fact, we are involved right now in doing a study so I can write an article on the trade charts, and no one has convinced me yet that they are accurate. Some of them are more accurate than others. But I think it is very possible for an album that doesn't actually do well for one reason or another to be somehow lifted to the high parts of the chart. I am not saying that this happens very often.

Q Will you repeat the names of the three types of chart?

A I mentioned three magazines that run them --

Billboard Magazine, Record World Magazine and Cashbox Magazine.

Q Are these magazines owned by the same publishing company?

A No.

Q They compete against each other?

A Yes.

Q As far as you know, do they make up their charts in unison or separately?

A They make them up separately.

Q Have you ever seen the chart positions of Rock and Roll?

A No, I have not.

Q Well, we have marked one of them as an exhibit. Let me show you Exhibit 250 marked in evidence. These are the Billboard charts of Rock and Roll. You will note that Rock and Roll appears --

MR. BERGEN: That is not the Billboard chart; that is a chart you prepared, Mr. Schurtman.

MR. SCHURTMAN: We have the underlying charts in the courtroom. I offered them, and I think it is an accurate listing of the charts.

THE COURT: We understand.

Q Now, you will notice that Rock and Roll, which

was released on February 13, 1975, first made the charts the week of March 8, 1975, it became No. 18 by March 15, 1975, then 12, then No. 10, 8, 7, and at its highest point No. 6 for the week of April 19,1975, and then it started to go downhill again.

Does that indicate to you that at least during this early period the record was doing well either in terms of sales or in terms of air play or both?

MR. BERGEN: You just asked him that question hypothetically generally and he answered it.

A It indicates that it probably was.

MR. SCHURTMAN: Tht it was probably doing well?

I would like to offer at this time similar summaries of Cashbox charts and Record World charts. Those are the three magazines that the witness has mentioned. I offer the Cashbox charts as 250-B, the Record World charts as 250-C, and the composite of Billboard, Cashbox and Record World as 250-D.

THE COURT: Any objection?

MR. BERGEN: yes, I object to them. I don't see what they have to do with the case.

THE COURT: Overruled.

MR. SCHURTMAN: I have all the underlying charts

in the courtroom.

THE COURT: We will just take the summaries.

MR. BERGEN: May we have copies of them, please, Mr. Schurtman?

MR. SCHURTMAN: We are handing them out.

(Plaintiff's Exhibits 250-B, 250-C and 250-D were received in evidence.)

xx MR. SCHURTMAN: May I attach to these summaries just one representative copy of the charts so you will see?

THE COURT: You do that at lunch.

Q Let me call your attention to Exhibit 250-D in evidence, which shows Billboard, Cashbox and Record World, and I call your attention to the fact that during the week of March 29, 1975, Rock and Roll was NO. 10 in the Billboard listings, No. 8 on the Cashbox listings and No. 8 on the Record World listings.

The following week, April 5, it was No. 8 on Billboard, No. 7 on Cashbox and No. 4 in Record World.

The following week, April 12, 1975, it was No. 7 in Billboard, No. 6 in Cashbox, No. 4 in Record World.

Now, the fact that it had relatively similar positions in the charts published by these three separate

magazines, does that indicate to you that the record was doing well in terms of air play and/or consumer sales?

A It indicates to me that in terms of the air play and consumer sales information collected by the trade papers that it was doing well.

(Continued on next page.)

T5

Q Were you here when Mr. Lennon testified last week?

A Yes. For some of it at least.

Q Were you here when he testified that the way kids find out what's on a record, what tracks are on the record, for example, what type of music is on the record, is when they go into the record stores and play the record?

A Yes.

Q Before they buy it?

A Yes.

Q I think you said a few moments ago that record stores don't permit that any more. Did I misunderstand you?

A No. They used to. In general, they don't.

THE COURT: Mr. Lennon doesn't go in record stores.

THE WITNESS: As a matter of fact, in England which is where Mr. Lennon did most of his record buying they still do. They don't in America.

Q I take it in the United States if you want to find out what's on the record you either have to buy it or listen to it if it is played on the radio or you have to listen to it at some other kid's home. Is that correct?

A Yes.

Q I take it you do feel that word of mouth advertising- in other words, kids telling each other what's on the record,

what type of music -- is significant in effecting sales?

A The most significant ultimately.

Q It is the most significant factor?

A To me. I mean that's what it was when I was a kid.

Q You saw the way the record sort of peaked in April or May of 1975 on the three charts I showed you, and then started going downhill again. If at that time it was having heavy sales and the kids were telling each other about what the record was, do you draw any inference or conclusion from the fact that it then started going downhill again? What would have caused that, in your opinion?

A What would have caused it? Either that the people heard it and decided it wasn't good and created negative word of mouth or as many people as there are in the world interested in the Lennon Rock and Roll album had already bought it.

Q When Mr. Bergen questioned you, Mr. Marsh, you started to give us a history of Beatles and the world of rock and roll and then you told us about Mr. Lennon. Was that your opinion of Mr. Lennon's career since 1969?

A You mean since the break up of the Beatles?

Q Right. Since he's been a solo artist.

mdh 3 March-cross

A In an artistic sense?

Q In any sense.

A I mean artistically I would consider at least until he started spending a lot of time in this immigration thing I would consider it one of the most brilliant careers in music, and even since then it's been a fascinating career artistically speaking.

THE COURT: What time do you fix for the immigration problem?

THE WITNESS: Around right after -- around the same time as the Sometime in New York City album. I mean right after that or right before that.

Q Would you say that his career since leaving the Beatles has been a confused one?

MR. McHUGH: Objection.

THE COURT: Overruled.

It isn't confusing to me. I guess it depends on . much attention you pay to it.

Q Would you say Mr. Lennon has been having career difficulties since he left the Beatles?

A Not since he left the Beatles but since the immigration.

Q Have you ever reviewed any of John Lennon's albums since he left the Beatles?

A Certainly.

Q Which ones?

A That I remember for certain, Imagine, the very brief thing I wrote about the Rock and Roll album, perhaps a very brief thing about Mind Games, a rather longer piece about Sometime in New York City, and possibly a piece about the Plastic Ono.

Q And those are the only ones you remember at this time?

A Yes. I am pretty sure those are the only ones there are.

Q Did you give good reviews to Imagine and Mind Games?

A Mind Games I was not wild about. I liked Mind Games, the single. I am not certain I ever wrote about that. When I wrote the capsule review sometimes it is what I remember writing or what I remember thinking, but what I am saying is, Imagine, yes, I gave a very glowing review to.

Q Was that a good one?

A That's what I am saying, a very glowing review.

Q Glowing. I thought you said long.

A Both.

Q A long glowing review?

A Yes.

Q In that list you just gave me you didn't mention Shaved Fished. Didn't you review Shaved Fish just four months ago?

A Sure. I forgot that.

Q Let me show you your review of Shaved Fish, Plaintiffs' Exhibit 260 for identification. Appearing in Rolling Stone Magazine December 18, 1975, page 68. Did you write that?

A Sure.

MR. SCHURTMAN: May I offer it in evidence?

THE COURT: Any objection?

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 260 received in evidence.)

Q Mr. Marsh, in your review you state, with reference to Shaved Fish that "The feeling of this record is so diffuse that it probably does present an accurate overview of Lennon's confused career since leaving Beatles."

Does that refresh your recollection that it is your view that Lennon has had a confused career since leaving Beatles?

A I thought you meant was it confused in terms of

the events. It was not confusing to me in terms of the events themselves. I thought when you asked the original question in terms of some of his reasons for making certain kinds of records or doing certain kinds of things. Certainly it is confusing. It is confusing to many,I think.

Q What about the reference at the bottom to Mr. Lennon's continued career difficulty?

A What about it?

Q What are you talking about? Are you talking about Lennon's music, his personal life, or both, or neither?

A I am talking about the way in which his attempt to solve his immigration problem has affected his music. One of the things I am talking about by implication, I think, is the fact that he hasn't done an album of original material since Mind Games which at this point when this review was written must be about two years. That would seem to be the difficulty.

Q Do you think it is important for him to come out with original material?

A I think at a certain frequency, yes. Not exclusively, no.

Q But I take it you do attach some importance to Lennon's own compositions?

A Of course. That's the reason. I mean why else would

I think he was a great artist. If I thought he was only a great interpreter of other people I would have said so.

Q Let's talk about your views of the Roots album. In the first place, are you aware of the fact that this was supposed to be a television mail order package?

A Yes.

Q Are you familiar with television mail order packages?

A I had a couple, yes.

Q Did you ever review them in your magazine?

A No.

Q Are they ever reviewed?

A Not in any of the publications of which I am aware.

Q So critics generally don't pay any attention to mail order packages, right?

A Most mail order packages are not of original interpretations or of original material, and, therefore, the packages themselves -- I mean you would have to literally review the packages, because the other music is old, and that function has already been taken care of.

Q Do you know whether the quality of the vinyl in mail order packages is the same as in albums sold in regular retail stores?

A On at least one of the ones that I own it is.

Q You said there was a difference in shinyness. I suppose I will have to ask the court to compare the two. I don't know how to do it on the record. You mean the reflections?

A Of light.

Q From the vinyl?

A I mean one of them is deep black and one of them is not.

Q On that you base your assumption there was a difference of quality?

A On that and the feeling of brittleness, yes.

Q Do you own a copy of Roots?

A No, I don't.

Q You said that the picture on the front cover was not a true picture, that it was some sort of composite?

A No, I did not say it was a composite.

Q What did you say?

A I said it seemed to me, knowing what I know about printing production techniques, that it was fairly obvious that it was not taken from an original photograph, that it was taken from some kind of rep[illegible]nted photograph. But I would guess -- what I would guess is that a negative was made from someplace where that picture had been published

before. I am not sure.

Q You just don't know, do you?

A I don't know exactly what the process is, but it is obvious to me that that photograph was probably not made from an original negtative. I mean from a 35 millimeter's slide kind of negative. If it was then it is just a horrible photograph. My experience as a journalist tells me what usually happens when you see a reproduction like that is that it is a reproduction because you lack an original photograph.

Q If I were to tell you that this was taken from a transparency that was sold to the manufacturer of Roots by a commercial photographer would that change your testimony?

MR. BERGEN: I object to that. He is testifying now. Why don't you bring in the photographer?

A No. It would just make me very surprised.

Q Let me show you Defendants' Exhibit AG which was offered by the defendants. It is a letter dated February 7, 1975, from a commercial photographer offering to sell a number of transparencies.

A And is that photograph Mr. Balitsos, or I mean Mr. Dietz, or whoever signed that letter?

Q I don't know.

A Pardon me?

MR. BERGEN: You say you don't know?

THE COURT: Where are we now?

THE WITNESS: I am lost, I'm sorry.

THE COURT: Okay.

MR. SCHURTMAN: Then let me help you find yourself again.

Q You were very critical of the Angel Baby on Roots. You made various comments which are in the record. Did you object to the fact that it seemed like a sort of slow, dragging song?

A No.

Q That didn't bother you?

A No.

Q It was --

A The tempo was not a factor.

Q Are you familiar with the original of Angel Baby?

A Certainly.

Q Isn't the original of Angel Baby a very slow, dragging tempo, too?

A Yes.

Q Have you ever heard the two tapes from which Roots was made?

A I don't know what you mean. Do you mean the two-

inch wide master tape?

Q The Roots album was cut -- was made from two 7-1/2 IPS tapes?

A Quarter inch.

Q I guess they are quarter inch.

A Okay. No, I never heard them.

Q Are you aware of the fact Mr. Lennon made these tapes?

A No.

Q If Angel Baby and Be My Baby were out of tune and had the other deficiencies you attributed to them, was this something that in your opinion Mr. Lennon would have been aware of?

A I am certain he was.

Q If I were to tell you that Mr. Lennon delivered these tapes to Mr. Morris Levy -- this is a hypothetical question --

MR. BERGEN: I am going to object because there's already been a finding on the record why they were delivered.

THE COURT: Just a second. Let's hear the testimony.

Q The judge has found that Mr. Lennon delivered these tapes to Mr. Levy after spending a week or so in the recording studio, and delivered them to Mr. Levy for listening purposes, in connection with a possible TV

package album.

MR. BERGEN: That is not what the finding was.

MR. SCHURTMAN: That is what the finding was.

Q Anyway, use that as a starting point. Does it surprise you Mr. Lennon did not tell Mr. Levy or anyone there are two out of tune songs and these tapes and under no circumstances are we going to use them? Does that surprise you?

A I don't think that is necessary.

THE COURT: Please don't answer the question. That is just completely out of -- it has nothing to do with what this witness has testified. The witness has testified as to his opinion of the record, and that is all.

Anything else?

MR. SCHURTMAN: Your Honor, I will ask you to strike the witness' testimony about what he read in the trade papers about the confusion between Roots, and so on, unless we can find out what he is talking about, because it was just too vague. I will ask him the question again. I couldn't get an answer the first time.

Q You testified that the reason you knew that there was some confusion about Roots and the other album was because you had read things in the press. Can you pinpoint what it is that you read?

A No. What I believe I read was announcements of the Adam V album and announcements of the Capitol. If I am wrong about that -- you know, if there were no announcements then I obviously didn't read about them and I heard about it through some other mysterious factor without seeing the TV commercial. But, you know, I know I did know that there was a TV package and it was confused in my mind with the Capitol package. I was not certain whether there were two separate albums or whether Capitol was marketing it through TV.

Q When did your confusion end?

A When I read this article, Exhibit 280.

Q The confusion ended after you read the article in April of 1976?

A Yes. I read that article before it was published.

Q You mean all that time you were confused about whether there were two albums or one album?

A Yes.

Q Did you ever ask anyone about the confusion?

A Who do I know to ask?

Q You could have asked the reviewer of the Capitol album whether he had checked with anyone to see--

A We did talk about it. I testified already we did talk about it at that time. It then didn't seem to be

an issue in my life very much.

Q Mr. John Landau when he wrote his review for Rolling Stone didn't say anything about any confusion, did he?

MR. BERGEN: Objection, your Honor, the article speaks for itself.

MR. SCHURTMAN: I know it does.

A Probably because we presumed it was a marketing technique that Capitol was using.

Q The Capitol advertisements for Rock and Roll appeared in various trade magazines which were released on February 17th, four days after the release of Capitol. This was in one of defendant's exhibits. Did you see any of these ads?

A The print ad?

Q Yes.

A Is it more or less like the album cover?

Q Yes.

A Sure.

Q Did you see it when it first appeared?

A Yes, I am sure that that is when I saw it. I remember seeing the ad because it is a very striking photo.

MR. SCHURTMAN: Let me offer them in evidence at this time. Plaintiffs' Exhibits 251 and 252. 251 is

Cashbox Magazine, issue of February 22, 1975, which, according to the defendants, hit the newsstands on February 17th.

And Plaintiffs' Exhibit 252 is the February 22nd issue of Record World, which was also released on February 17th, and I understand there was a similar ad in Billboard, same issue, same release date, except I don't have it, your Honor, but it is the same thing.

The ads appear on page 17 of Exhibit 252 and page 8 of Exhibit 251.

Q I show you these two ads. Sir, are these the ads that you saw on or about February 17th?

A I don't know. I saw them whenever the magazines were published.

Q You do receive these magazines, don't you?

A Sure. I get them on Monday.

THE COURT: Any objection?

MR. BERGEN: No objection, your Honor.

MR. McHUGH: No objection.

MR. LARSON: No objection.

(Plaintiffs' Exhibits 251 and 252 received in evidence.)

xx

Q Now, you have testified that you were somewhat familiar with typography and photographic compositions, and so on, is that correct?

A Yes.

Q Let me show you the actual Rock and Roll album, Plaintiffs' Exhibit 35. I ask you to compare the cover on Plaintiff's Exhibit 35 with the two ads appearing in these magazines. There was some testimony about how these were two-color ads instead of four-color ads. Just so we can get it in the record, could you tell me if these ads had been four-color what really would have changed when you compared the album and the ads?

MR. BERGEN: I object to the question. I don't see the purpose of it.

A I don't understand what you mean what would have changed. Obviously, the color back here would have been natural color instead of magenta and John Lennon--

Q Anything else?

A There is a certain difference of tone down here.

Q Do you think that would have affected the sales one way or another?

MR. BERGEN: Objection, your Honor.

THE COURT: Overruled.

A Do I think it would have affected the sales?

Q Yes.

A I don't know. I don't suppose so.

THE COURT: Speak up.

THE WITNESS: I don't think so.

MR. SCHURTMAN: The purpose was the difference between two-color and four-color advertising, which was the point Mr. Zimmerman made.

THE COURT: All right.

Q For the record, Mr. Marsh, how old are you?

A 26.

MR. SCHURTMAN: I would like to offer as an exhibit Mr. Marsh's undated letter to Mr. Bergen.

THE COURT: Any objection?

MR. BERGEN: Yes. I don't understand. He objected vigorously to its introduction on the direct case.

MR. SCHURTMAN: I would now like to offer it.

THE COURT: Is it marked for identification?

MR. SCHURTMAN: I think Mr. Bergen marked it for identification.

THE COURT: Let's have it marked as a plaintiffs' exhibit now.

(Plaintiffs' Exhibit 340 marked for identification.)

MR. SCHURTMAN: I have nothing else of this witness, your Honor.

THE COURT: Wait a minute. I haven't received this. Is there an objection now or not?

mdh 18

MR. BERGEN: No, your Honor, no objection.

THE COURT: All right. I will receive 340.

xx (Plaintiffs' Exhibit 340 received in evidence.)

THE COURT: Any other questions?

MR. BERGEN: None for me.

THE COURT: Anyone else?

MR. LARSON: No.

MR. McHUGH: No.

THE COURT: Thank you, Mr. Marsh.

(Witness excused)

THE COURT: We will recess until 2:15.

Just refresh my memory. What were the dates of Levy television ads? We have that, I know, somewhere.

MR. SCHURTMAN: They finished February 16th.

THE COURT: When did they start?

MR. SCHURTMAN: I believe on February 8th. Some of them, not all of them. The period was February 8th to February 16th.

(Recess to 2:15 P.M.)

mdh 1

AFTERNOON SESSION

2:15 P.M.

THE COURT: What have you now?

MR. BERGEN: Your Honor, John Lennon rests.

I would just like to make clear on the record we do rely on portions of the Capitol case.

THE COURT: Of course.

MR. BERGEN: Another point, your Honor. I would like to file two short memoranda, both of which I am giving to Mr. Schurtman, and I would like to file an original and one copy with the Court.

The last thing I have is I wonder--

THE COURT: What is the memorandum?

MR. BERGEN: One memorandum on the mitigation of damages with respect to Lennon, and another is a short memorandum on Mr. Levy's personal liability under Mr. Lennon's counterclaims.

THE COURT: Okay.

MR. GRUMBACH: I would like to state, too, for the record that Capitol and EMI rely on the evidence in the Capitol case.

THE COURT: I think all the evidence applies wherever it applies.

MR. BERGEN: The next thing -- I don't know if

mdh 2

this is when you want to do it, but as long as you have the equipment here--

THE COURT: I have two conflicting things running in my mind. One is time, and one is I would very much like to hear that record.

I would like to know how much more testimony do we have? It is really up to you, Mr. Schurtman, now.

MR. SCHURTMAN: On the defendants' counterclaims all I want to do is read in some deposition testimony, read in a few admissions, and that's it.

Then on our own amended claim I have at least one or two witnesses I want to put on.

THE COURT: I think that this would be a good time, since we have time, to just play through the record now.

Mr. Bergen, do this for me. Just give me again some typical things from Walls and Bridges briefly, and then swing into Rock and Roll.

MR. BERGEN: The first song I am going to play is from Walls and Bridges. The exhibit is CB4, and the song is Whatever Gets You Through The Night.

(Record played)

THE COURT: Let me hear another one from Walls and Bridges. Which one is this?

mdh 3

MR. BERGEN: Bless You.

(Record played)

THE COURT: Okay, put on another.

MR. BERGEN: Do you want me to play something from the other side?

THE COURT: Yes. Why don't you do that.

MR. BERGEN: I am playing a song called Number Nine Dream, which is from side 2 of Walls and Bridges.

(Record played)

THE COURT: Anything else from that record? Let's just go to the Rock and Roll.

MR. BERGEN: I will start on side 1 of the Rock and Roll album.

THE COURT: Okay.

(Album played)

THE COURT: Thank you very much. I think we can let the equipment go back. We will take a recess and then you will read some depositions.

(Recess.)

MR. McHUGH: Before Mr. Schurtman proceeds on the record, Apple rests its case.

MR. SCHURTMAN: Have all the defendants rested?

THE COURT: Yes, they have.

MR. SCHURTMAN: Your Honor, I would first like to read two short admissions from defendants' amended statement of undisputed facts, Plaintiffs' Exhibit 102 for identification.

And then paragraph 116 states:

"Also on February 1 Tillinghast informed Wood by telephone that Levy was planning to advertise the Roots album on television at $4.98."

That refers to the year 1975 and I believe Mr. Tillinghast has been identified as the assistant general counsel of Capitol and Wood has been identified as head of BMI.

Then I would like to read Paragraph 118 from defendants' undisputed statement of facts:

"On February 4, 1975, Kline called Menon

and told him that RCA was pressing Levy's album, the dates of Levy's television merchandising, and the substance of Levy's copyright notice."

Next I would like to read from Mr. Lennon's deposition, page 248, starting at line 19, and I believe Mr. Kanzer was examining Mr. Lennon:

"Q What do you understand your audience to be?

"A I have no idea of their age or what they are, but they are pretty much established, you know. My interest in the TV package idea was (a) it was a first, and (b) I would avoid the criticism, because the critics were lying in wait for this album, and those two subjects were most important to me."

THE COURT: Read that again.

MR. SCHURTMAN: Yes. Maybe in all fairness I should start one question earlier, at line 15:

"Q Did you think you would attract an enthusiastic audience, a different kind of audience from the ones that would buy in the store?

"A No, my audience is pretty much set.

"Q What do you understand your audience

to be?

"A I have no idea of their age or what they are, but they are pretty much established, you know. My interest in the package idea was (a) it was a first, and (b) I would avoid the criticism, because the critics were lying in wait for this album, and those two subjects were most important to me."

Your Honor, that testimony was given in the context of what was discussed at the Club Cavallero meeting.

Next I would like to read from Mr. Seider's deposition, page 118, and Mr. Seiderwas again testifying about the Club Cavallero meeting. I will start at page 117, line 24:

"In fact, I know from my own observation of John that the television stays on almost constantly, although no sound comes out of it, so he is a great watcher of TV and he has seen adds for records on television, and he thought it might be an approach putting out the record on television, because what he was concerned about was the timing of the album was too late, he thought the album would be reviewed badly

mms

of what had taken place and the kind of disarray that the various matters were in."

Next I would like to read from May Pang's deposition, page 77. She is also being questioned about the Club Cavallero meeting.

MR. BERGEN: She is not a party. I object.

MR. SCHURTMAN: She was acting as Mr. Lennon's agent.

MR. BERGEN: What proof is there?

MR. SCHURTMAN: We have 2000 pages that she was acting on behalf of Mr. Lennon.

MR. BERGEN: I object.

THE COURT: Is this about the same subject matter?

MR. SCHURTMAN: She will say the same thing, that the critics were lying in wait for him. It is cumulative.

And then Lennon's deposition at page 229, and this was the meeting that he had with Mr. Coury on January 28, 1975, page 229, line 12:

"Q Tell us everything you can recall about what Mr. Coury said to you during that two-hour meeting?

"A Well, he listened to what I said, you

know, which is -- if you put it on TV, people have been waiting for this album so long the critics aren't going to like it, whatever happens. They are waiting for this wonderful goldies album from Lennon and Spector, and there would be more publicity than I had ever had before, and I said -- " this is Lennon talking to Coury -- "how about if we went straight to TV like it was already an oldies but goldies. The critics wouldn't get at it and you could just buy it. And he says, along with a lot of other things, (A) that it would upset radio people, it would upset distributors and people all down the line that would not be happy and maybe it would have repercussions on subsequent albums that are put out, and that they were the main points that stuck with me about all these people being upset.

"And he also convinced me because by then I was almost sick of the album, it had gone on for two years. I had never been involved in one piece of product in my life and I was just getting nervous about it. I didn't know whether it was worth putting out, even, and I am still not sure about it. I still had reservations about putting

it out at all, but he convinced me, as they say in the record business, he could go with it, they were interested in the product, they werehappy with it, the people played it liked it, and he restored my confidence in the album as an album and that's the main gist of it."

(Continued on next page.)

mdh 1

T3

MR. BERGEN: What line is that?

MR. SCHURTMAN: It ends line 16 of page 230.

Then next I want to go to Mr. Coury's deposition at page 69, starting at line 16. He is talking about the January 28, 1975, meeting again, and the testimony went as follows: "when we left that dinner that evening we went back to my suite at the Sherry Netherlands Hotel -- that is me, Harold Seider and May Pang. We were then joined by my marketing team, Dennis Killeen -- he is the head of advertising and merchandising -- and I also had present there with me. Mr. Roy Kahora. He is the art director at Capitol Records, he makes up the album covers. We were then making the formal presentation which, by the way, we were asked to several weeks before by Harold Seider who said why don't you make a formal presentation to John like we did on 'Walls and Bridges.' We do it prior to a major release.

"We presented from the album cover concept right through the different media advertising type concept. John made some suggestions. He had a suggestion in relation to the album cover. We had --he thought it would be a good idea if we contacted this particular German photographer who he knew who wasn't closely involved but involved with the Beatles in the early days of the Beatles. He took

pictures of the Beatles before anybody knew who the Beatles were at the early stages of their development as a group, that he had photos that we might be able to purchase.

As a matter of fact, he gave us the telephone number. May Pang called this gentleman up whose name was Jergen Vullmer. He was a German photographer who took pictures of the Beatles in their early stages and he would sell them to people in the street, a package of 25 photos for $10. He owned all the rights to them. He owned the rights to them. He had the photo that John thought that we would consider for the album cover. This was the photo."

There is more testimony about the photo, if you want to hear it.

THE COURT: No.

MR. SCHURTMAN: Then I will skip that.

Then starting on page 17, at line 16.And I believe the reference is to Roy Kahora --

"He went through an extensive marketing campaign discussing the different medias, including television, on January 28th. Mr. Killeen ran down a complete marketing campaign in the presence of Mr. Seider, Lennon and May Pang and myself. John just thought it was a fantastic marketing

campaign. He approved and made some minor corrections which is normal routine procedure.

We left the meeting then. I think the meeting adjourned late in the evening -- it was, I'd say, around one o'clock in the evening. My marketing people left the room. John, Harold and May and myself had a glass of wine and then the meeting broke up.

This is the ironic thing. I left that meeting and the next day I went back to Los Angeles to report to Mr. Bhaskar Menon on the progress of the meeting and marketing plans relating to the John Lennon 'Rock 'n' Roll' album forthcoming and I was very excited in anticipation of this album coming to us and John told me that the tapes would be following that week, they were making the masters."

That is all I would like to read from the depositions, your Honor.

May I respectfully call the Court's attention to transcript pages at the first trial 932 to 943, which also deal with aspects of the January 28th meeting and discussions of the marketing plan.

Although this is already in the record may I call the Court's attention to Plaintiffs' Exhibit 56, which ws s the letter from Mr. William Dyczko of RCA, dated February 14, 1975, in which he confirmed that he had spoken

mdh 4

to the Capitol people and that RCA wouldn't continue to fulfill any orders for the Roots album.

This is also covered at transcript page 656.

At this point, your Honor, plaintiffs and defendant Levy rest on defendants' counterclaim.

THE COURT: On your affirmative claim, do you have evidence on that?

MR. SCHURTMAN: Yes, I do.

THE COURT: Will you present that?

MR. SCHURTMAN: Very well.

Your Honor, I have one question, the same question I think Mr. Bergen put to you before. We have evidence from the first trial pertaining to the settlement agreement made in October, 1973, before your Honor in the Come Together case and what happened subsequently to that settlement agreement, what records were made, what weren't made, why they weren't made. We can refer to that, I assume, we don't have to put it on the second time.

THE COURT: Yes.

MR. SCHURTMAN: Then I come to the damages phase of the case and I call Mr. Harvey Zucker.

MR. McHUGH: Since neither Apple Records, Inc. nor Capitol nor EMI are involved in plaintiffs' counterclaim, or plaintiffs' new counterclaim against Mr. Lennon, we would

mdh5

like to be excused from the case.

THE COURT: Before you excuse yourself what I think we ought to do is set a time for oral argument.

MR. McHUGH: Yes, sir.

THE COURT: Do you want to do that tomorrow?

MR. SCHURTMAN: I am prepared to argue tomorrow.

THE COURT: Why don't we do it tomorrow?

MR. LARSON: I will check on Mr. Prettyman's availability.

THE COURT: Tell him we will have oral argument tomorrow and we will expect him tomorrow.

It is obviously not going to take all day, so let's have it at 2 o'clock in the afternoon.

MR. SCHURTMAN: I may not finish with this witness tonight, your Honor.

THE COURT: That's all right. Then we have the morning. I have a sentencing which is fairly long tomorrow, but I am certain we can work this all in.

MR. SCHURTMAN: In other words, we will continue with testimony in the morning and then have the argument at 2 o'clock?

THE COURT: Yes. I have to finish at 4:10 today, and then if you need to spill over tomorrow you can get together about 11 or so tomorrow and then we can have our

oral argument.

Let's go.

H A R V E Y Z U C K E R, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Where do you reside?

A Scarsdale, New York.

Q What is your occupation?

A I am a Certified Public Accountant and I am also controller of Roulette Records, Adam VIII and Big Seven Music Company.

Q Will you tell us briefly your educational background, starting with college?

A Sure. In 1964 I graduated from Long Island University as an accounting major.

I then joined the firm of H. Merdinger & Company, Certified Public Accountants, with a diversified accounting practice. I began as a junior accountant and worked my way up to senior accountant. It was while I was at this firm that I became a Certified Public Accountant. I worked on auditing, taxation and accounting.

Then in 1970 I joined the firm of Weissbarth,

Altman & Miller, Certified Public Accountants, also with a diversified accounting practice. I spent approximately 30 to 40 percent of my time auditing companies in the record and related industries. It was while I was at this firm I became senior auditor in charge of Roulette Records, Adam VIII, and Big Seven, and in 1973 I joined them as their controller and have been their controller ever since.

Q In your capacity as controller of Big Seven are you familiar with the books and records?

A Yes, I am.

Q Were you asked to prepare a series of schedules from the books and records of Big Seven Music Corporation?

A Yes, I was.

Q To reflect certain claimed losses relating to the failure on the part of Mr. Lennon -- and I am simply telling you what your position is -- the failure on the part of Mr. Lennon to perform certain things under a 1973 settlement agreement.

A Yes.

Q Let's run through some of these schedules. I first show you a schedule marked Plaintiffs' Exhibit 301.

Can you tell the Court what Plaintiffs' Exhibit 301 for identification is?

A Sure.

Q What are domestic mechanical royalties?

A Royalties generated through record sales, and domestic means the United States.

Q You have a note saying statutory rate of 2 cents?

A 2 cents would be the rate we would be getting on a song. 2 cents per recording.

Q Without repeating what is on the exhibit, what is Plaintiffs' Exhibit 301 intended to reflect, briefly?

A It is supposed to reflect the amounts due for the three songs that were supposed to be included in the next album of Mr. Lennon.

Q How have you defined the next album of Mr. Lennon for these purposes?

A As far as my understanding of the case is the next album was supposed to be Walls and Bridges.

Q So you have taken the domestic sales of Walls and Bridges?

A That's correct.

Q And computed what the sales would have been, what the royalties would have been, if Mr. Lennon had recorded certain songs in Walls and Bridges?

A That's correct.

Q I take it with respect to the song You Can't

Catch Me you have simply shown the difference between what it would have been had it been in Walls and Bridges and what it actually was because he did record it on Rock and Roll?

A That's correct.

Q With respect to the song that was not recorded at all you have used the Walls and Bridges album as a standard?

A That's correct.

Q And you have simply multiplied 425,000 sales times the statutory royalty of 2 cents?

A That's correct.

Q And I notice you have nothing on for Ya Ya. Why is that?

A Ya Ya was included in the Walls and Bridges album.

Q So you have not accounted for that at all?

A That's correct.

MR. SCHURTMAN: May I offer 301 in evidence.

THE COURT: Any objection?

MR. BERGEN: No objection, your Honor.

THE COURT: All right. 301 is received.

xx (Plaintiffs' Exhibit 301 received in evidence.)

Q I will show you next Plaintiffs' Exhibit 302. What is 302 intended to reflect?

A The exclusion of one song on either Walls and Bridges or in the alternative Rock and Roll.

Q In other words, these are alternative computations?

A That's correct.

Q In the case of the one song excluded on Walls and Bridges, you have included a loss of $9,480 for domestic royalty but you have a question mark for foreign. Do you have the foreign figures on Walls and Bridges?

A I wasn't given the foreign sales so I don't know how to compute it.

Q With respect to Rock and Roll were you given the foreign sales?

A Yes, I was. And the sales were only through various periods. I believe from June, 1975, through September, 1975, and I used those for my computations.

MR. SCHURTMAN: Your Honor, we have a problem on the foreign sales of Walls and Bridges. We have subpoenaed the foreign sales from the defendants. We have served several subpoenas. Either yesterday or this morning Mr. Granett informed me, or rather informed Mr. Diamond, that Capitol doesn't have the foreign sales figures, that we have to get them from EMI to subpoena them.

THE COURT: Tell Mr. Granett to call EMI in London and to have that information for tomorrow morning.

MR.BERGEN: Big Seven has gotten royalty payments with respect to the version of Ya Ya on Walls and Bridges. They should have gotten royalty for the entire worldwide sales so they should have the figures. I don't know anything about this subpoena, we weren't served with any, but if they have gotten royalty statements they should know how many records were sold.

Q Can you explain that, Mr. Zucker?

A Yes, I can. In foreign countries these sales are sometimes delayed up to six months, sometimes longer, up to nine months. Also, many countries don't even give us the units sold, only dollar amount, and I really don't know what the actual sales were.

THE COURT: Call Mr. Granett and tell him he is to get in touch with EMI and they are to have those figures in tomorrow morning.

I am afraid I don't understand 302.

Q Mr. Zucker, will you explain 302 in more detail?

A Sure. All I am trying to do is show the amount of moneys we would have received if the one song was included on Walls and Bridges or in the alternative Rock and Roll.

THE COURT: This is an alternative calculation of what is on 301?

THE WITNESS: The third song not recorded by

Mr. Lennon.

THE COURT: I still don't understand it for some reason. You have got $9,480 for domestic.

THE WITNESS: That's correct.

THE COURT: That is from 301, right?

THE WITNESS: That's correct.

THE COURT: Then item 2 is what again?

THE WITNESS: That's the amount of royalties we would have received if we assume that the song was excluded on Rock and Roll rather than Walls and Bridges.

THE COURT: Here you have got the foreign sales.

THE WITNESS: That's correct.

MR. SCHURTMAN: 301 is only domestic sales. 302 picks up foreign sales as well.

The problem we have, your Honor, just to put it in context, is that there is some question of defining what the next album was. If you assume that Walls and Bridges was the next album you get one result. If you assume that Rock and Roll was the next album you get another result, so we asked the accountant to prepare both types of results.

mdh Zucker - direct

THE COURT: Okay.

MR. SCHURTMAN: May I offer 302 in evidence, subject to filling in the foreign sales when we get them?

THE COURT: Yes, I will receive it.

(Plaintiffs' Exhibit No. 302 received in evidence.)

Q The next exhibit is Plaintiffs' Exhibit 303 for identification. Mr. Zucker, is 303 simply a detailed breakdown of Item 2 on 302?

A I believe so, yes.

Q Take a look at it.

A I don't hav e the exhibit in front of me.

Q Keep all the exhibits in front of you, sir.

A All right.

Yes, that is.

Q I believe you mentioned that you have foreign royalty figures only up to a certain date?

A That's correct.

Q Do you know what the dates are?

A The dates vary by country from June of 1975 through, I believe, September of 1975.

MR. SCHURTMAN: I offer 303 in evidence as a supporting schedule.

MR. BERGEN: No objection.

THE COURT: 303 is received.

(Plaintiffs' Exhibit No. 303 was received in evidence.)

Q Mr. Zucker, so far you have simply given us the calculation of mechanical royalties, depending on the exclusion of one song and certain other matters you have just described?

A Yes.

Q Were you told that testimony had been given by Mr. Levy and Mr. Kahl at this trial relating to additional losses that they claimed had been sustained by Big Seven as a result of Mr. Lennon's failure to record that song?

A Yes.

Q Were you asked to make certain projections in connection with these losses?

A Yes, I was.

Q Can you describe to the Court briefly the type of approach that you used, and then we will get into the projections.

A Sure. Basically, what I did was we took a number of songs that were rerecorded by various major artists and some lesser artists at various points, and then calculated the earnings that were generated from the song from the time it was rerecorded until the present time.

Q When you say rerecorded, can you define that a little more clearly?

ASure. It is where we have a song that has been recorded once by some artist, then a new artist, such as whatever may be a John Lennon, would rerecord the record and include it in his album or whatever.

Q Were you told -- and this is simply a postulated for your testimony -- that it was the position of Mr. Levy and Mr. Kahl that when a major artis like Mr. Lennon records an old song that this generates new interest in the song and that other artists will then record the same song?

A That's correct.

Q You were told that?

A Yes, I was.

Q And your figures are based on that understanding?

A Yes, it is.

Q Did Mr. Levy furnish you with certain song titles on which to base your projection?

A What we actually did was we had a meeting between myself, Mr. Levy, and Mr. Kugler, who was the assistant controller of the publishing companies, and at another date with Mr. Kahl we had discussed and brought up certain songs that we knew were rerecorded. I looked them up and used them for

my projections.

Q Let me show you Plaintiffs' Exhibit 201. Can you explain to the Judge what 201 is intended to reflect?

A This is a song Oye Como Va. This is a song that was recorded in 1963 by, I believe, Tito Puente. In 1971 a major artis called Santana rerecorded this song, and what this schedule shows is the earnings from the date we acquired the copyright, which was in 1963, until the present time. It shows the mechanicals, which I believe I explained before what they are, and the performances, which is the amount of money we get on playings over the radio.

Q -Are you saying you get two types of royalties when a song owned by the Big Seven Publishing Comp;any is recorded by someone?

A Yes.

Q One is the mechanicals?

A Yes.

Q And the other is what?

A Performance royalties.

Q Which are paid whenver the song is performed on the radio?

A That's right.

Q I interrupted you. Will you proceed with your explanation?

A Okay. What I have done, as I said before, is I have summarized the earnings from inception through the final date. If we look down at the bottom figures we find the amounts of money retained by our U. S. corporation, which in this case is Planetary Music Publishing Corporation, and our 100 per cent subsidiaries in foreign countries, and if you look at the two figures on the right-hand side of the page you will notice that the amounts retained by the U. S. corporation, which is Planetary Music Publishing, was $145,000, and the amounts retained by our 100 per cent subsidiaries is $33,826, for a total of $179,000.

THE COURT: This was recorded in 1963?

THE WITNESS: Yes.

Q And you own the copyright?

A We own the copyright; that's right.

Q Do I understand correctly that the song just limped along until June, 1971?

A That is correct.

Q And then Santana rerecorded it?

A Yes.

Q After Santana rerecorded it, what happened to the song?

A After Santana rerecorded the song, the song generated $179,000 of mechanical and performance income after paying out royalties and what-not.

Q In this case you are analogizing John Lennon to Santana?

A Yes.

Q And your position is that if John Lennon had recorded the third song that he failed to record it might have achieved a comparable result?

A From the past testimony that I have heard, Mr. Lennon is an artist of great stature. I would assume that he is as big as Santana, if not bigger.

MR. SCHURTMAN: I offer 201 in evidence.

THE COURT: May I ask about it?

Let's start with June, 1971. You talked about mechanical royalties. Who was paying you mechanical royalties?

THE WITNESS: In this case it was Columbia Records.

THE COURT: And they recorded the thing in 1971?

THE WITNESS: That is correct.

THE COURT: As part of an album?

THE WITNESS: Yes.

THE COURT: So they paid you $52,500 gross royalties in June, 1971, and $26,261 net royalties. What is the difference between net and gross?

THE WITNESS: Gross is the amount of money that the publishing company received; $26,000 is the amount we paid out to our writer and we retained $26,261.

THE COURT: Again, the performance royalty is what?

THE WITNESS: Performance royalties are the amount of royalties we receive when a record is played on the radio.

THE COURT: It seems to be fairly successful for what -- four and a half years?

THE WITNESS: That is correct.

THE COURT: Isn't that an unusually long time?

THE WITNESS: No, we have records that could

continue to earn over a period five, six, seven years. There is also the fact that other artists pick up and record, as in this case, Santana records it, and all of these earnings are reflected here, too.

THE COURT: Some other people are recording?

THE WITNESS: That is correct, after Santana.

THE COURT: When did the other people start recording it?

THE WITNESS: I would have to take a look.

MR. SCHURTMAN: The witness is looking for his back up information.

THE WITNESS: Yes, do you have that?

In 1963 and 1964 and 1968 we have records by Tito Puente, then in 1970 -- 1971 -- excuse me -- CBS records, Santana picked up the record and rerecorded it. Thereafter we have The Ventures, Percy Faith. There is a number of artists on this particular list.

Q What sheet are you reading from, Mr. Zucker?

A The song sheet, what they use in our publishing business.

Q This shows the various artists who recorded both before and after Santana?

A That is correct.

MR. SCHURTMAN: I would suggest this be offered

as Plaintiff's Exhibit 201-A, the back up sheet for 201.

THE COURT: Any objection to 201 and 201-A?

MR. BERGEN: On 201-A when we asked for the documents from Big Seven we were not given any document like 201-A. In fact, we were just dumped a pile of licenses with respect to Ya Ya, Angel Baby, and You Can't Catch Me, but, secondly, 201 doesn't show anything. Mr. Zucker had said something about generating income. There is no evidence that it is going to, that it will. There is no evidence that it is of any comparison with Aye Como Va and You Can't Catch Me, Ya Ya or Angel Baby. And the other thing it shows is that I believe Mr. Levy and Mr. Kahl testified that these mysterious cover records would occur within a year or two years or six months, and this shows that the cover record by Santan appeared eight years later.

MR. SCHURTMAN: May I respond to all three points briefly?

With respect to the first point, Mr. Bergen requested certain information. He asked for permission to send his auditor in. We gave him permission. He sent his auditor in. I am not certain it is the gentleman who was siting there. We showed him everything he wanted to see. That is point No. 1. That

was about a week ago.

MR. BERGEN: It was not a week ago; it was about three weeks ago.

MR. SCHURTMAN: Three weeks ago? It couldn't be three weeks ago. It was while this trial was on.

As to what Mr. Levy testified the record speaks for itself. He testified that when a record is going along and a major artist comes along --

THE COURT: But I take it this is simply to show what happened on this particular record, and you will try to connect it?

MR. SCHURTMAN: These are not projections; these are actual figures on what happened on this particular song, Oye Como Va.

THE COURT: I will overrule the objection and receive it.

MR. BERGEN: May I ask that the Court have the plaintiff, Big Seven, produce tomorrow the song sheets similar to Oye Como Va for Ya, Ya, Angel Baby and You Cab't catch me?

THE COURT: Fine. Let us make it 11 o'clock tomorrow.

MR. BERGEN: Last week we subpoened Mr. Kahl and we asked Mr. Levy to be here so we could cross-examine.

We were not permitted at the first trial to cross-examine Mr. Levy or Mr. Kahl with respect to this testimony on this issue, and we would like to have them in court tomorrow.

MR. SCHURTMAN: I respectfully disagree. They cross-examined them on this issue very, very thoroughly.

MR. BERGEN: I will read to you from Mr. Kahl's testimony.

THE COURT: There is a Judge being sworn in in about two minutes. I will see you back here within 15 minutes and then we will resolve this.

MR. SCHURTMAN: I am perfectly willing to bring Mr. Levy and Mr. Kahl to court tomorrow and we can resolve it then.

THE COURT: That settles that. All right.

(Plaintiffs' Exhibits 201 and 201-A were received in evidence.)

(Adjourned to April 8, 1976, at 11.00 a.m.)

BIG SEVEN MUSIC CORPORATION,
et al.,

vs. 75 Civ. 1116

JOHN LENNON, et al.

New York, April 8, 1976;
1.30 o'clock p.m.

(Trial resumed.)

- -

THE COURT: Due to our time problems and he delay in getting started, we are going to have oral argument now to the counterclaims of the various defendants against the plaintiffs and against Mr. Levy. I started to question defense counsel just as far as their theory, and I will continue that for a moment.

Now, as far as Apple, is thereany distinct damage claim of Apple? I did not get it articulated when we were here before, and I think there is not.

MR. McHUGH: No, your Honor.

THE COURT: Any award of damages will be, at least, according to the defendants' side of it, their claim, it would be for Capitol a net profit figure, for EMI the loss in pressing fee, for really, I guess, Lennon and Apple, technically if I award royalties -- who would get

that?

MR. BERGEN: Lennon. As far as the counter-claims they are against Adam VIII, Big Seven and Levy individually.

THE COURT: What is the theory against Big Seven? Big Seven didn't put out the record?

MR. PRETTYMAN: Big Seven is the one who purportedly got the rights in the first place and then assigned them over.

THE COURT: You have got a bunch of tort theories. You are not suing for breach of contract. I don't see any theory against Big Seven, because Big Seven didn't put out the album.

What did Big Seven do to commit these alleged torts?

MR. PRETTYMAN: It depends on when you think the whole thing began. If you think it began on October 8, it was either Morris Levy individually or Big Seven represented by him that was sitting there attempting to make this deal which never went through, and then, of course, without any legal right at all assigned its rights to Adam VIII.

MR. BERGEN: Big Seven really used Adam VIII as its instrumentality to commit the tort. They said

that they assigned the claim or the contract to Adam VIII, but at some point there was testimony that Big Seven was going to get something back.

MR. SCHURTMAN: The assignment was made in December, 1974; the alleged tort did not happen until after January 30, 1975.

THE COURT: Let me start with Mr. Prettyman.

MR.BERGEN: I just want to add one other thing.

In addition to the damages that Mr. Lennon claims on his royalties and the difference in price, we have this other claim for the use of his name and likeness.

THE COURT: The only way I can get an angle on anything concrete, if you could prepare your proposed calculation, or whatever you want to call it, of the damages that you claim Mr. Lennon is entitled to both with respect to the loss of royalties, and then on this Section 51 claim, boil that down to a proposal as to some monetary amount.

MR. BERGEN: Yes.

THE COURT: All right, Mr. Prettyman.

MR. PRETTYMAN: As I stated off the record, your Honor, I am not going to argue the law of the case, because we have submitted a memorandum to your Honor on that. You, of course, have already found misappropriation

in your prior opinion, and I think clearly the other charges that we have made are fully supported by the evidence and by the law, and I am not going to take the time to do that, unless your Honor wants me to. I would propose, instead, to proceed directly to the damages that we believe we are entitled to. In doing so, however, and to put it in context, I would like to bring your Honor's attention to the crucial event that I think is extremely important when you determine culpability, if you will, and I am not just talking abou- punitive damages, but I am talking about intent, when you are considering the intent of Mr. Levy, and proceeding, as he did. I think that it does apply, not only in terms of our specific losses, but in terms of judging his culpability and the extent to which he should be made to pay for it.

That event occurred on January 28. The reason I stress that, no matter what view you might take of Mr. Levy's state of mind up until January 28, maybe that he had worldwide rights, maybe that they are going to get EMI's permission, maybe he does have TV rights because of contracts, even if you give him every benefit of the doubt up until that date, on that date he was told by Mr. Seider that he had no rights from anyone. From that

point on the contract does not come into it or anything else, because from that date he was told, "EMI is not going togive you permission; Capitol is not going to give you permission; Apple is not going to give you permission; you cannot put out this album."

It was on that specific date, if you will recall, he tells Mr. Seider he is going to put it out. He gets on the phone and tells Mr. Klein he is going to put it out. That was a conscious decision on his part to go ahead when he knew he had no rights.

Now, I start with that kind of a background and I point out to you that we were in a situation on that date of having spent over $200 in getting those Spector tapes back and in trying to get this album out, and all of a sudden we are faced with this competing album.

Now, what kind of losses do we think we sustained here? Let's just take the Rock and Roll album first and our sources or theories of damage.

First of all, the evidence is perfectly clear from the three people who testified that the decrease in the price from $6.95 to $5.95 would not have occurred but for the competition from Roots. Mr. Menon testified to that, Mr. Posner testified to that, Mr. Zimmermann testified to that.

mms

There is nothing to rebut that. That price went down becauseof this competition.

THE COURT: Just refresh my memory. You are talking about the reduction of the price of the album?

MR. PRETTYMAN: Yes, Mr. Menon testified to that, Mr. Posner testified to that, and Mr. Zimmermann testified to that without equivocation.

THE COURT: What I am actually getting at, during the first part of this counterclaim trial we didn't talk about the tape. Then we brought the tape up a little later and the tape was reduced.

MR. PRETTYMAN: The tape, I believe, was reduced proportionately, but the numbers include the tape, that is the numbers when we talk about albums, we are always talking about albums and tapes.

THE COURT: Have you got this Exhibit DL before you?

MR. PRETTYMAN: Yes, sir.

THE COURT: Now, this difference in profit, I gather, takes into account any reduction in the price of the tape?

MR. PRETTYMAN: It is my understanding, your Honor -- I have to refresh myself by Mr. Posner's deposition on that point -- but it was my recollection that he

mms

was saying that since the figures for units include tapes, that it included a proportional decrease in tapes.

THE COURT: Yes, I have got his testimony now. That is right. In other words, he averaged the reduced prices of the album and the tape and so forth.

All right.

MR. PRETTYMAN: Now, this testimony about the fact that the album would not have been released but for the Roots album is substantiated. There cannot be any question about it by the Defendants' Exhibit DB, because that shows out of 622 Capitol albums over the last five years, only two had been priced below the regular price -- Rock and Roll was one of them, and you heard the explanation as to the other one. So there can be no question about that.

Secondly, we, of course, point out the confusion in everyone mind that was caused by the competition from the Roots album.

You heard Mr. Lennon testify about confusion when the album came out; you heard about it from Mr. Marsh; you heard Mr. Zimmermann talking about the confusion even in his own sales force, and no less among customers when these two albums came out at the same

time.

No. 3, we talk about the competition, about the television campaign. Now, I think Mr. Perry's testimony is extremely important here, because when you simply look at their list of TV spots, it doesn't give you any kind of impact of the number of people who actually saw that advertisement and appreciated the harm that it did. But we took, you recall, 59 spot TV announcements in certain markets between February 10 and February 16, and Mr. Perry introduced an exhibit in which he said that those spots -- and they were not all of the spots -- they were just some of the spots for some of the areas -- that he said that over a million household impressions were made.

You recall that he could not say that that was over a million different people, but what he did say was that based upon his experience he thought the figure would be closer to 800,000 than the lower figure on that exhibit. Not only that, but, of course, even the same person seeing an advertisement twice is more harmful to you than if that same person had seen the advertisement only once. When you consider that that exhibit is an extraordinarily conservative one, because we took very late evening hours, from 11 o'clock to closing time,

mms

rather than the earlier hours, when he said a substantially greater number of poeple would have been looking, when you consider that we are only talking about part of the market that those TV spots covered, you will find that several million people, I think you can assume, at least, saw this terrible album cover on television, and the effect that had on Mr. Lennon.

There was also testimony from Mr. Zimmermann that the threat of Mr. Levy's television commercials hurt our sales to distributors, because they were concerned not only with regard to their own direct sales, but what effect this was going to have on future sales; they were aware of the fact of what Adam VIII was doing and this caused greater concern at Capitol.

There was also the problem of the rush job that was caused to Capitol by the threat of the Levy album. There was testimony that for maximum effect on sales and promotional efforts, your efforts should be timed to precede or coincide with the album release. Both Mr. Menon and Mr. Zimmermann testified to that effect, and Mr. Zimmermann further said it is impossible to make up for the lost opportunity if you fall behind in those first few very crucial weeks of your campaign.

He said that loss of momentum cannot be made up.

mms

Capitol's promotional campaign was either too little or too late or not at all. First of all, as to television and radio spots, there was testimony from both Mr. Menon and Mr. Lennon that the quality of the spots was diminished by the rush to get them out, and as to those spots, the TV spots, we have the fact that the number was lower, the markets were fewer, and the money spent was much less.

Mr. Zimmerman said that the original plan was to spend $150,00 to $200,000 on television, with 50 to 75 spots in each of 22 major markets, for a total of 1100 to 1650 different spots for the Rock and Roll album. Actually, as a result of the competing spots for Roots, we ended up with only 29 spots in three markets, and the television ads did not begin until after March 7, when, as a matter of fact, they should have been out all the way back in early February.

The radio ads were not as effective as television, of course, and they were not aired until ten days after the release of the album.

Next, there was no release of a single record prior to the release of the album. You will recall that there was testimony from Mr. Zimmermann if Capitol had not been in a rush they might have been able to

nms

release a single album in advance of the album itself.

You will recall that Marsh testified that a big single does contribute to an album's sales. Then there was the problem of trade advertising. Mr. Zimmermann pointed out that some of their ads had to be two-color, instead of four-color, and the ads were late.

The exhibit shows, for example, that Billboard, Cashbox and Record World were not coming out until February 17, March 15, or March 8, and also that the positioning of those ads was poor because of the rush in trying to get advertising into Rolling Stone, and that ad came out in the May issue, instead of the March issue, quite a difference, because of the shortness of time.

So promotional album items were scrapped completely. I am talking now about things which had been planned and which could not be done at all, promotional items that were late, for example, the Sunset Strip Billboard was not actually put out until March 7, a full month later, the posters which arrived in arfived in Los Angeles on February 15 did not reach customers until two weeks later; the press kit, which arrived February 27, did not get around the country until four days later, postcards and so forth were all late. Some promotional items were both decreased and late.

mms

On the T-Shirts, normally they would put out three to five thousand, they were only able to get out 1450, and when they arrived on February 27 they did not actually ged distributed until weeks.

The buttons, normally 3000, they actually had only a thousand and they were late. And the stickers, normally three to five thousand, actually only a thousand, and they were late.

We move then to estimating the loss, first, to Capitol. You will recall the testimony about the effect of the price decrease. I don't know whether you want me to run through each of these items or not, your Honor, but it seems to me that they are quite clear on the exhibits that have been given to you. Certainly, the ultimate effect of the price decrease on Capitol alone was $150,000. I can go through precisely how that was reached.

THE COURT: As long as we are on that point, Mr. Schurtman raised a question of how to calculate the profit.

Have you got this Exhibit 241-A? You have got calculated $1.47 profit on the $6.98 album pricing.

MR. PRETTYMAN: Do you want me to run through this?

THE COURT: The point is why don't you explain that and go into the question. The question Mr. Schurtman raised was whether or not there should not be an allocation of overhead to the so-called additional sales or additional mark up.

MR. PRETTYMAN: Your Honr, I think on the overhead I cited to you a case which I think is perfectly clear which directed us not to consider that, and that case, you recall, was American Electronics ersus Neptune Meter, decided by the Supreme court in 1968, in which they clearly held that overhead should not be allocated.

As I understand how these figures were reached, the testimony was that the actual sales of Rock and Roll were 342,000 in the United States, 65 in Canada on international finished goods, for a total of 437,000.

Now, to diminish per unit profit, first, there is a difference in the wholesale price, which is 48 cents; then you have increased merchandising cost --

THE COURT: What are you dealing with?

MR. PRETTYMAN: I am dealing with the testimony at 2924, but the exhibit that was put in, your Honor, is DL.

Do you have DL?

THE COURT: I must have. I was just looking

mms

for it. I was focusing on 241.

MR. PRETTYMAN: Well, 241-A backs up the DL and the way to get to the 24 cents, which, as you see, is at the bottom of 24-A --

(Continued on next page.)

mdh 1

T2

THE COURT: All right.

MR. PRETTYMAN: We have th 437,000 unit. You get the difference in the wholesale price of 48 cents. We have increased merchandising costs associated with the 6.98 price of 24 cents, which is the same figure which is on 241-A.

THE COURT: But 241-A is the thing that I am struggling with at the moment. Can you explain that?

MR. PRETTYMAN: What is it you want me to explain?

THE COURT: Just what it is. I thought I knew, and then when I looked at the --

MR. PRETTYMAN: I thought that this was simply a list of how he got to the 24 cents profitability.

THE COURT: What does it mean?

MR. PRETTYMAN: That he has his discount allowance, his future returns, net sales, and then he starts into his various costs here -- packaging, production, transportation, and so forth.

THE COURT: Let's take column under the heading 6.98-7.98.

MR. PRETTYMAN: Right.

THE COURT: The $3.54 is, as I understand it, from the testimony, Capitol's average price to its customers on such albums and tapes. Right?

mdh 2

MR. PRETTYMAN: Yes. I believe that's right.

THE COURT: Then below you have all of these costs which he calls variable costs, and in that column they add up to $2.06. He has excluded, if I recall, the items with the red dots. Am I right?

MR. PRETTYMAN: Yes, I think that's right, your Honor.

THE COURT: Because he considered those not variable but fixed. Right?

MR. PRETTYMAN: Yes. Mine are not red, but I can see the dot.

THE COURT: The $2.06 he has there is all of what he considers the variable costs. Then he subtracts the $2.06 from the 3.53--

MR. PRETTYMAN: He drops down. He takes the 3.62 from the 4.45.

THE COURT: No, he takes the 2.06 from the 3.53.

MR. PRETTYMAN: To get the 24 cents, right.

THE COURT: And he gets $1.47. What's the significance of the $1.47. That's what?

MR. PRETTYMAN: I can't even see the $1.47 on my exhibit, your Honor.

Oh, here it is down here, yes.

The difference between the $1.47 and the $1.23

mdh 3

is the same 24 cents.

THE COURT: But what's the $1.47. How do you characterize that?

MR. PRETTYMAN: Can you give me just one moment, because I wasn't here when this was introduced.

THE COURT: Sure.

MR. PRETTYMAN: Can I allow Mr. Kenney to explain that to you, because I wasn't here when this was introduced?

THE COURT: Sure.

MR. KENNEY: The 3.54 represents the mixed unit price, albums and tapes, that can be applied to all units. The 2.06 is the total of variable costs excluding the dotted items. The difference of $1.47 represents the profit that would be associated with the 6.98 price.

These units were not sold at the 6.98 price. This is what our estimate of what that profit would have been.

We know, if you look at the top column, the comparison between 3.06 and 3.54 the difference there is 48 cents. That is what you might call the gross difference between selling at 5.98 and selling at 6.98.

We have also figured in increased merchandising costs. That is a little bit confusing because we have two

mdh4

24 cents figures here. We started with a gross of 24 cents. We have increased merchandising costs of approximately 24 cents. That you get by comparing the $1.82 variable costs with the 2.06 variable costs.

THE COURT: I guess the theory is that if you sold an additional album for 6.98 -- no, you wouldn't sell it for 6.98. If you sold an additional album, or let's say a nice group of albums and tapes for 6.98, 7.98, suggested retail price, you would make an average gross sale price, as far as Capitol, of 3.54 on that bunch of units, and that out of that, taking away all the cost items that would be there anyway regardless of whether there were these additional albums and tapes, you would make $1.47 per unit offering, is that right, net.

MR. KENNEY: If you don't include those costs which would be there regardless.

THE COURT: That's Capitol's theory, that you can calculate damages that way, right?

MR. KENNEY: Yes, sir.

THE COURT: Okay.

Now, I want to go to item 1 on Exhibit DL.

There we assume for the moment that we want to calculate the additional profit that Capitol would have made if it had charged the original price for the album

mdh5

and the tape, the 6.98 for the album and what would it be for the tape? I am using the wrong terminology. It is not the Capitol charge, but the suggested retail.

MR. PRETTYMAN: And they sold precisely the number of albums that they did in fact sell.

THE COURT: There I am a little skeptical about the 24 cents figure. The only way I can put it is to ask you in that particular calculation should you not allocate the overhead? Now, I don't know how much difference it makes, but, you see, I can see your theory on item 2. I can see that if you are talking about selling additional albums you calculate the net, I can understand that. I don't understand item 1. I don't know why you don't allocate the overhead, but I don't know what difference it makes.

MR. KENNEY: There are two possible ways to look at it. It comes to exactly the same thing.

Capitol's argument is that the suggested retail price had been 6.98 instead of 5.98 more money would have been coming in. 3.54 could have been coming in instead of 3.06. Initially we start with the proposition that more money would be coming in.

The next question is, well, if the price had been higher would more money have been going out in costs

mdh6

as well.

We know there are certain fixed costs that did go out, that would have gone out at the same rate under the 6.98 price. Those we don't concern ourselves with because the question is will more money be going out in costs, the Capitol be paying more money out because they have a higher suggested retail price?

One of the ways in which they would be putting more out, as counsel for Lennon has pointed out, is that royalties would be higher at a higher suggested retail price, so we would have certainly higher variable costs.

THE COURT: Have you gone over the testimony? Mr. Posner gave us the allocation of overhead figures. Have you gone over those figures?

MR. KENNEY: In general terms.

THE COURT: He said that if you cranked in an allocation of overhead, the normal allocation of overhead, if you cranked that into the left-hand column you would be cranking in 61 cents, which I take it to mean you would reduce the $1.23 figure by 61 cents. Am I right?

MR. KENNEY: Yes, that's correct.

THE COURT: If you crank in a normal allocation of overhead on the right-hand column he said it would be 68 cents, so I take it that would mean you would subtract

mdh7

68 cents from the $1.47 and you would get 79 cents after all that.

Are you with me?

MR. KENNEY: I am with you, except that I can't say that I recall the testimony that way.

THE COURT: I've got it in front of me, and let's just assume --

MR. PRITTYMAN: What page is that, your Honor?

THE COURT: I've got my notes, but you have got the testimony. I think my notes are right.

MR. KENNEY: The definition of overhead, your Honor, does not change as other things change. That's why the overhead should really be the same if it is really overhead.

THE COURT: The difference it makes is this. You figure in item 1 of Exhibit DL $105,000, and the way you get it is you multiply 24 cents by 437.

If we crank in overhead the result is that you do this. Your net profit after oberhead in the left-hand column is 62 instead of $1.23. The net profit in the right-hand column is 79 cents instead of 1947 if you crank in overhead.

I subtract the high profit from the lower profit, I get 17 cents, and if I use that I would be using a

mdh 8

multiplier of 17 cents rather than 24 cents, and that makes a difference of some thousands of dollars.

Why should I do one versus the other?

MR. KENNEY: To the extent that there is an increased cost associated with the difference in price that increased cost should be subtracted out. I am trying to determine as I stand here --

THE COURT: I get your point. In other words, you are saying just as in the case of increased numbers of albums sold you take the position the law is you don't spread the normal overhead over those added albums, right?

MR. KENNEY: Yes.

THE COURT: By the same token your argument is you don't spread the overhead over an increased dollar price.

I'll have to think about that.

Go back to Mr. Prettyman. Thank you very much.

I guess the big problem I've got is the question-- and we have had all kinds of proof about it -- what was the cause of Rock and Roll selling$3.42 versus some other thing. Another way to put it is, if there hadn't been the competing album, and if their promotion had gone in accordance with what Capitol says should have happened, what kind of reasonable estimate can I make on what the sales

mdh 9

would have been. Would they have been any higher or would it have had any effect, how much effect, and so forth.

That's really the crucial thing, and to say nothing of the problem about impact on Shaved Fish, and two other pages.

MR. PRETTYMAN: Your Honor, I am sure, can appreciate the difficulty of undue specificity in this area. You have several million people looking at an advertisement which everybody said not only confused confusion but which took Mr. Lennon's reputation down.

You have the confusion in the marketplace of the two albums being advertised at the same time. You have us behind, and the clear testimony that we were harmed in that regard, and then that the reason that we tried to give you some maneuvering room here instead of giving you a specific figure of saying, all right, this caused us three hundred forty seven thousand six album difference we tried to give you in DC a series of alternative figures.

The reason we did that was no matter what you took it came up to not that much of a spread, really. You start down at an absolutel minimum of 500,000.

THE COURT: Why is that the absolute minimum? Mind Games, Walls and Bridges, sold 425,000.

MR. PRETTYMAN: It seems to me you have to start

mdh 10

here with -- you can't just compare this album with other album sales. You have to start with what they expected. Then you go through and you see what it did in relation to, for example, Canada. You have that problem. You have it in relation to certainly other albums, that's a possibility. You start here with the fact in preparing their fiscal 1975 budget, you will recall, that had nothing to do with this case, that they thought they were going to do 750,000.

You start way back that far.

Then when they first found out that Rock and Roll was coming out they asked Mr. Posner and Mr. Zimmerman whether they could make money at 5.98, and they asked them to come up with some figures as to what they thought would really happen.

What came back was that in the light of this competition there would be an absolute minimum of 300,000 medium, 400,000, 500,000, but the testimony is clear all three figures were low on purpose, because obviously if you sold a great many, a million albums, you didn't have to worry. So you put that in.

Then you have your testimony from Mr. Zimmerman as to what he honestly thought based on his experience this album would sell. Then we took our averages of other

mdh 11

albums. We took all five and then took out the bottom one and took out the top one so as to try to make it fair, and those were the first three items on DC. That was the average of the five prior Lennon albums. Then we took out Sometime in New York, and then on the next one we took out Sometime in New York and Imagine for the reasons explained on the stand so as to give you a comparison with other albums.

We took the entire list of ten figures; what you find on DC is a range of from 500,000 up to 756,000, but with an average of 645,000, which takes an awful lot of things into consideration. The 645,000 actually is not that far from what they originally thought they were going to sell.

It just seems to me that based on the testimony of the impact that you can easily find that using all -- no matter what type of variables that you use, throwing them all into this pot, they average out to 645,000, which is still below what they originally thought they were going to sell before they ever got mixed up with this other album.

I think that would be a fair figure based on all the testimony.

THE COURT: On this Exhibit 110 and other exhibits

we have taken 342,000 as the figure for Rock and Roll. Is that current?

MR. PRETTYMAN: It is down a little bit. Though we were hurt by it, we are willing to accept that as the latest figure.

You would subtract that from your average.

THE COURT: I think it is difficult for a lawyer to argue when he hasn't the foggiest idea what the judge is thinking. I will let you know what I am thinking as I pretty much have all the way along. Mr. Schurtman and all of you can shoot at this.

I think it follows from my earlier decision that I think that there is a liability here on the counterclaims on both the Lanham Act and the common law copyright misappropriation of property. I don't think as a matter of law there is much question about that. There are some problems about interpretation of 43-A of the Lanham Act as it is not the world's clearest statute, but on one theory or another there is liability.

Also, I think there is a very serious question that Mr. Schurtman was well justified in examining at considerable length and that is the causative impact of any problem caused by his client versus the causative impact of the type of album.

I have to tell you, Mr. Schurtman, that I don't think there was any impact --

MR. SCHURTMAN: Can I argue?

THE COURT: You can argue better when you know what I am thinking and it is subject to revision.

I don't think the record company has promotion advertising companies, whether it is T-shirts, mobiles or what, I don't think they have got scheduling, I don't think they do these things for no reason at all. I think that the scheduling of an album, the cover, the promotional items, the timing of the release of the promotional items, all of that is done for a reason, and I can't presume that when it gets fouled up nothing happens.

Furthermore, there was a Rock and Roll dip down to 342,000 lower than its two companions on either side. The Canadian sales were strong where there was none of this competing advertising.

The plaintiffs here don't have to make a perfect case, and they have shown enough that I can put several two and twos together and I think come up with something that I think really indicates some damages.

On the other hand, I have to tell you, Mr. Prettyman, that I think your estimates of sales are extravagant. I have listened to this record and I have

mdh

listened to the comparable music. I have heard really some extremely interesting and telling evidence both in Capitol's favor and on the other side about how this album would be expected to sell, and my feeling is that making an estimate as a judge, in being objective about it, I would take the minimum benchmark just for estimating purposes.

I know there is no mathematical certainty in any of this, it's got to be an estimate. I take the minimum benchmark as Walls and Bridges. My maximum benchmark--

MR. PRETTYMAN: What was that figure?

THE COURT: That's 425,000. I think the evidence about the Canadian sales was quite interesting and convincing. There was an exhibit Mr. Posner put in about Canadian sales, Mind Games and Walls and Bridges, Exhibit DG. Now, that indicated in his calculations, which we are all familiar with, that one might have expected a 520,000 sale of Rock and Roll.

I feel that to exercise some responsibility here I have to be realistic, and I think there comes a point where I would be speculating. I just think this 600,000 range is so far and above what he was able to achieve on anything except Imagine I couldn't go to it, but my feeling, Mr. Prettyman, Mr. Schurtman, and everybody,

is that realistic, sensible range here-- and I am sure this doesn't please anybody in the room -- is somewhere between 425,000 and 520,000. That's my minimum and my maximum.

As far as the decrease in price, I think you have made a good case on that. That's the framework of my thinking right now.

Furthermore, I find in view of Mr. Lennon's particular situation in his career -- I find it difficult to believe -- let me put it this way. I think that there was an impact of Mr. Levy's album on the Rock and Roll album. It is tangible, it is documented, it is there. As far as an impact on Shaved Fish and future albums, that to me is just pure speculation. I have heard the evidence. That's where I am.

MR. PRETTYMAN: Then I will concentrate on trying to convince you that you should take the 520,000 instead of the 425,000, because obviously I respectfully disagree with your Honor about the 600,000 figure, but you listened very carefully to the evidence in this case, and I think you have made extensive notes, and I think you have tried to take a very balanced view of this thing and I am not going to try to talk you out of going higher than the 520,000, and I am also not going to try to talk you

into giving us money for Shaved Fish and subsequent albums.

I honestly do believe that we are going to be hurt by Shaved Fish and subsequent albums. I recognize--

THE COURT: You mean not by Shaved Fish. You mean in Shaved Fish.

MR. PRETTYMAN: In Shaved Fish, that's right. In Shaved Fish and in subsequent albums.

I recognize the problem of trying to quantify that, but I would hope that your Honor would take into consideration the fact that if you are not going to give us any credit for that because you can't put a specific amount on it, and in view of the fact that Mr. Posner was extremely conservative in some of the figures that he gave you for the reasons that he gave you, in view of the fact that the top figures run up as high as 750,000, and that the 645,000 after all is merely an average of some figures, I would hope that that would convince your Honor that sales would have been certainly at the 520 instead of the 425.

THE COURT: How do you justify going above the 450? Shaved Fish isn't even at the 450 mark, it is at the 408 mark. If you are talking about 450, 475, 500 or higher, the thing that stares me in the fact is Walls and Bridges, 425, no competition from Levy. Shaved Fish,

408.

Your argument is that Shaved Fish was hurt by Levy, and I will certainly -- I am anticipating what you say, but I have to tell you that at least Shaved Fish -- Capitol had every opportunity to promote it to its heart's content and it didn't have any competitive confusion and it turns out at 408.

For me to stick up Rock and Roll at the high 400s or above 500 I've got to tell you that gives me problems.

MR. PRETTYMAN: In terms of Walls and Bridges, it's been out for a lot longer and the returns have had time to come in and it is down. If we were to come back a year from now I don't know what the figure would be. We probably would be down to around 250 or something.

THE COURT: Mr. Prettyman, if there should be a different projection on the final sales of Rock and Roll that should be in the evidence. I am trying to calculate the ultimate sales, aren't I?

MR. PRETTYMAN: Yes. All I am saying is that it is not fair to compare at one point in time the Walls and Bridges sales to the Rock and Roll sales because the history of both albums is that you have returns coming back and returns had a lot longer to come in insofar as Walls and

Bridges were concerned, whereas our returns, as you can see from the sheet, are still coming in and they are coming in substantially, and we may be at the same point in time where Walls and Bridges is now a lot lower. So it is not a fair comparison, if you get my point.

THE COURT: I wish I had a comparison in the record I could make, but I will do the best I can.

The record I have is 425 for Walls and Bridges and the 342. I can take those things into account in a rough way. I get your point.

MR. PRETTYMAN: I really have very little more to say, your Honor, because the figures, once you select what we would have sold you just kind of multiply them out. I haven't done on the basis of the 520 because I have been doing it on a different basis, of 645, but at least the figures are there as to what the anticipated profit on each sale would be, and it is just a question of multiplying it out in each case.

Insofar as the Crescent fee is concerned for EMI there again you just multiply it out via 12.05.

THE COURT: I've got the Crescent pretty well figured out.

MR. PRETTYMAN: I would simply argue to you that in view of the fact that you have at least three

clear violations -- and of course we would say more, in view of the fact you had this deliberate act when he put out the album when he knew he had no right to, those items should come in and weigh when you are trying to figure where the balance lies.

THE COURT: Isn't that a punitive damage argument?

MR. PRETTYMAN: I don't think so, though I think punitive damages are clearly called for hear because of that act and because of the way he never looked at contracts at all, he didn't inform us that this thing was going on, and the way this thing was carried out, rushed to get it out when he knew he had no right, that punitive damages are clearly called for.

mms

MR. PRETTYMAN: But I also think that the cases talk, when we speak of damages, not just about what the complaining party has precisely lost, but also about the degree of culpability of the person who caused those damages. And I think on that situation that if any balance is to be struck it ought to be srruck on the side of the higher presumptive figures, rather than the lower figures.

THE COURT: Why don't I hear from Mr. Bergen.

MR. PRETTYMAN: Can I have just one moment, your Honor?

MR. SCHURTMAN: Your Honor, the brief that was being typed in my office has just come down. I wonder if I may hand it up.

THE COURT: Yes.

MR. PRETTYMAN: Thank you, your Honor.

THE COURT: All right, Mr. Bergen.

MR. BERGEN: Your Honor, as far as Mr. Lennon's damages on the Capitol part of the claim, I just would like to add on the record that with respect to the decrease in the price from $698 to $598 I think Mr. Posner testified that Mr. Lennon's damages on that aspect of the claim would be 10 cents for every record that was sold.

THE COURT: I have got that testimony. His

ms2

testimony was that the Lennon royalties --

MR. BERGEN: 68 cents on the $6.98 and 58 cents on the 5.98, so you got a difference of 10 cents.

THE COURT: What would help me, if you take this Exhibit DL, I take it your claim is that there would be this 10-cent per unit item of damages for the decrease in suggested retail price?

MR. BERGEN: That is correct. And looking at No. 1 on Defendants' Exhibit DL, you will take 10 cents times the number of total units of 437,000, and that would be Mr. Lennon's damages with respect to the decrease in the suggested retail price from $6.98 to $5.98.

THE COURT: I somehow cannot put my hands on it.

What was the decrease in the suggested list price of the tape? Can somebody find that quickly?

MR. BERGEN: I think the take was normally $7.98 and the tape sold at $6.98.

THE COURT: That is In one of the exhibits, I see.

Well, we can confirm that.

How do you figure Lennon's damages on any decrease in the number of units, Item 2 of the exhibit?

MR. BERGEN: You will take the figure of 58 cents,

ms3

which is Mr. Lennon's royalty on a $5.98 album, you would multiply that times the difference, whatever your Honor finds, between what the Rock and Roll album sold and what your Honor finds that it would have sold.

THE COURT: Well, there is a slightly different royalty on the tape, isn't there?

MR. BERGEN: The tape royalty is 65 cents on the $6.98 tape, which is the decreased tape, and 74 cents on the $7.98 tape, which is the usual suggested retail price. In other words, the tape royalty is 4 cents more -- 6 cents more -- I am sorry -- than the disc, the record royalty.

THE COURT: Can I see Posner's testimony?

MR. BERGEN: I think it was right near the end of this testimony, after Mr. Schurtman had finished cross-examining. I think it was just before he was excused from the witness stand, and it was at the close of one of the sessions just before he was leaving.

THE COURT: The end of the day on the 31st?

MR. BERGEN: Yes, I think that is right.

THE COURT: I am at page 3073 of the transcript. He says that Lennon's royalty on the $6.98 disc is 68 cents and on the $7.98 tape it is 64 cents.

MR. BERGEN: I believe that is what I said.

ms4

THE COURT: How do you crank in the two levels of royalties for tape and disc in calculating for Lennon on this Item 2?

MR. BERGEN: I am not sure how you do that, because the sales figures, I gather, were not broken down for tapes and records. It just says units. We will just have to accept the disc royalty.

THE COURT: You go ahead.

MR. BERGEN: Now, as far as the Section 51 claim, your Honor asked before how do you place a figure on the compensatory damages. I am not really sure that I know the answer to that. We sought damages of at least $50,000 on the compensatory part of the Section 51. I think it is clear that we have proved a violation of Section 51. I think that was implicit in your Honor's decision on the breach of contract part of the dase, and I think all I can give you are some kind of benchmarks. I believe there was a decision yesterday by Justice Saypol over in the New York Supreme Court, where Normal Mailler was awarded $25,000 for the use of his name and excerpts from his book called Marilyn, about Marilyn Monroe, in an issue of Photoplay Magazine, and they apparently used the excerpts from the book and used Mr. Mailler's name on the cover. The Court awarded him $25,000 in

ms5

damages.

Now, in the Lennon case you not only have the use of Lennon's name, you also have the use of his picture on the album cover, and there must have been at least a dozen publications in the television ads, pictures that Mr. Lennon testified here last week he would not have approved had he been putting out the album. And I gather in the Photoplay case, in the Mailler case, they did quote directly from the book that he had written. But Levy and Big Seven and Adam VIII put out a record of poor quality, and, which I think is clearly established, contained songs that Lennon did not want in it, Angel Baby and Be My Baby.

He testified he took them off the Rock and Roll album finally, because he could not salvage them and make them into respectable artistic pieces from his viewpoint.

Mr. Lennon also testified that he did not allow his name or picture to be used to endorse products other than his own, that he and the Beatles over the years had never done that, and I think there you get to the publicity value of Mr. Lennon's name and his picture. He testified that he had received over the years countless offers to endorse various products, from the Florida

ms6

Citrus Growers Association to Coca-Cola and Pepsi, and that he had received an offer recently of a hundred thousand dollars to endorse some products from a Japanese manufacturer.

2 Now, with reference to the argument that there is nothing in the record or that the testimony does not mean anything because there is no way of calculating or seeing whether it is a bona fide offer, the fact is that it was an offer that Mr. Lennon testified to.

I think it is difficult to place a figure on the compensatory damages that Mr. Lennon has suffered because of the unauthorized use of his name and likeness, and especially the way it was used with this album, the album cover, the commercials and the type of products that was put out, something that Mr. Lennon just would not do, not only as to the two songs that I mentioned, but the fact that the album was made from a tape that was not finished and clearly, as we heard here in the courtroom, was of inferior quality, not even close to the Rock and Roll album in terms of quality.

I think you have to work into this claim for compensatory damages, and, really, the claim under Section 51, the right under Section 51 to grant punitive damages. There I think you get to a point where some kind of a

figure can be placed on it. Again, it is a figure that under the statute a jury in this case, your Honor, is entitled to award some kind of damages, not only for the purposes of punishing for a deliberate use of the name and likeness when the person using it knows that he does not have permission to do so, which is the case we have here, but also to deter not only that person from doing something like this again, but to deter other people from just going out and cavalierly appropriating somebody else's name and picture.

Just summarizing what we have here, you already found that Levy deliberately put out the album after he had been told that he didn't have the right to. I think it has been established that the cover is really a rush job, a slap-dash job, and was thrown together, and no real care was given to it, certainly, nowhere near the care that was given by Mr. Lennon to his previous album covers.

A tape was used that was not the final edited version, and again you get into Mr. Lennon's practice as an artist and what he used to do with respect to records, the great care he gave them. There are the Calbi notes of the mastering session, which show the lack of mastering session took over two days, 14 hours of mastering, and

yet the Roots album, the Brescio notes show that it was done in about an hour and a half, that there was no attempt to even change one of the tracks, the machines were set at one level and they ran it off. Whereas, in the Rock and Roll album under Mr. Lennon's supervision, there was a great deal of work done on each track.

That brings you into the fact that the Roots album itself was a very poor quality and that it was embarrassing to Mr. Lennon and damaging to his reputation. Anyone listening to the album can tell that. And I submit that Mr. Lennon and Big Seven and Adam VIII not only should have know.. that it was of poor quality, but must have known of it. Yet they still released the album.

All of t! factors, and, in addition, even after having been told by Lennon, EMI and Capitol in telegrams that Levy didn't have the right to put out the album, in a situation where he had not checked the Capitol-EMI-Apple-Lennon agreement or the Beatles agreement to find out what were the rights and whether EMI and Capitol actually had the exclusive rights with respect to Mr. Lennon, he then goes off and commences these lawsuits, which I believe generated a tremendous amount of unnecessary legal fees.

I think that is basically all I have, your Honor, unless you have some questions. I don't have a figure that I can put on the amount of damages.

MR. PRETTYMAN: Your Honor, Mr. Kenney has had a chance to review that testimony. Can we have a few moments to discuss it?

(Pause.)

MR. KENNEY: Your Honor, we start again with the proposition that the whole idea of overhead in its true sense is a cost which does not vary as the amount of sales vary or the price of the album varies, or whatever else may vary. It is a fixed cost by definition.

Mr. Posner testified as to how for purposes of estimating general profitability on Capitol allocated overhead, it was by taking 14 per cent of sales and just calling that overhead, the reason being that historically overhead is 14 per cent of sales, and you just have to find some way to apportion that out for each album that you sell. You can see that it is an arbitrary way, an arbitrary approach, because in a true sense, the one we are concerned with here today, overhead does not and can't vary with sales. The whole idea is that it is fixed.

The type of overhead that he was testifying to, it was overhead allocated by taking that percentage of

sales, and that is how he came up with that 61 cents figure and the 68 cents figure.

Our contention is that we have a similar problem here. Our problem is not to determine the overall profitability of different albums, but to take the same album and just vary one hypothesis, and that is, what the price of it is going to be, and we know that as the price goes up your income increases, but we also have to admit ad the price goes up certain of your costs also increase. But we do not admit, and it is contrary to reason, that those costs which were denominated overhead or fixed costs will increase. It is simply not in their nature to do so. The costs that increase are the merchandising costs.

We have testimony as to things that we would have done, and we have included those costs. If we had a higher price we would have done certain things more in the packaging and in the promotion. The royalties referred to just now by counsel for Mr. Lennon certainly would increase. But fixed costs do not increase. The 68 cents is the allocation of fixed costs. It has no relation to this. That is all I have.

MR. PRETTYMAN: Your Honor, you have not said anything about attorney's fees.

THE COURT: I will not award attorneys's fees.

MR. BERGEN: In the Esquire case decided in 1973, Judge Knapp had two paragraphs about damages, one about compensatory damages and one about punitive damages, and I can hand up the copy of that opinion, rather than read it.

THE COURT: What does this relate to?

MR. BERGEN: It relates to the Section 51 claim.

THE COURT: Let me read this for a moment.

(Pause.)

THE COURT: I will hear from Mr. Schurtman.

MR. SCHURTMAN: If your Honor please, you may recall that during the course of the trial I frequently objected on the grounds that certain testimony was inadmissible because the defendants had failed to show any causal connection between the release of 1270 albums of Roots and the very limited TV advertising that we had from February 8 to February the 16th, had failed to show a causal connection between those torts -- and you have found them to be torts -- and the damages sustained by the defendants.

Your Honor pointed out when I made these

objections that these were matters of legal argument, that you wanted to take in the evidence and that you would then decide what law to apply. So I have not had an opportunity to argue the issue of causation.

I am a little distressed to hear from your Honor's remarks that you seem to have, at least in principle, accepted the defendants' views of caustion. You feel a tort was committed, certain things happened, and somehow the two must be connected, and I find myself in the position where I now have an uphill battle to convince your Honor that, in the first place, the defendants did not sustain any losses, and, in the second place, even if they did sustain losses, these were not proximately caused by our torts.

THE COURT: Mr. Schurtman, let us not have an uphill battle. I told you that I would be an idiot if I sat through the testimony and didn't think. The only fair thing to do is to give you something to bite at. I want to hear what you have to say. There is no doubt about it, it is very important.

MR. SCHURTMAN: I fully appreciate that you told us what your thinking is. It is very helpful to me and it will guide me in my argument.

Let me spend a few minutes on the law of

causation, and I think you will find it on page 2 of the brief.

In American Safety Table versus Schreiber, that case holds in an unfair competition case, and this is essentially a so-called unfair competition case, that the plaintiff can recover only for losses that can be directly attributed -- and I emphasize the word "directly" -- to the unfair acts of the defendant. Of course, the parties are different, but we are talking about the claim and the parties against whom the claim is brought. Now, there has been some talk at various times during this case that where you have wrongdoing, a plaintiff or the party claiming damages must not prove the wrongdoing with certainty as long as he comes in with reasonable proof. However, there is a distinction in the law.

You don't have to prove the amount of damages with certainty, but the law says that you have to prove the causal connection with certainty. And the leading case on that subject is that of the United States Supreme Court, which aid in Story Parchment Co. versus Paterson Parchment Paper Co., cited on page 3 of my brief, and that case draws the distinction, it says in order to prove a causal connection between the tort -- and this presupposes the tort has been committed -- and the losses, you have to show --

and I will quote from page 4 of my brief -- that the damage necessarily and immediately and directly resulted from that tort. Those are the three tests the Supreme Court has laid down and is still the law -- necessary, immediate and direct.

Now, once you proved that, and the claiming party has the burden of proof on that, once he has gotten over that hurdle, then the rest of it is fairly easy, then you do not have to prove the amount with certainty, as long as you come in with reasonable estimates.

My point in this case, your Honor -- and I would say the better part of my brief is devoted to that point -- is to show by direct reference to the testimony and the exhibits in this record that the defendants in this case have not proved that their damages, be it price reduction or loss of sales, were the necessary, immediate and direct result of what we did, because what we did, your Honor, was to put out 1270 albums. That is all we sold. That is one-tenth or three-tenths of 1 per cent of what these people sold.

Sure, we got on the air, we had television for six days in certain limited markets. You heard the expert stumbling over his figures and cumulative analysis and uncumulative analysis about how many people saw that.

All I can tell you is that of all the people who saw it, only 1370 shelled out some money, and for all I know, all these other millions of people who saw it, or, at least, several hundred thousand of them went out to a store, they saw the Rock and Roll album on the shelves and they said, "Hey, isn't that what we saw on TV? Let's buy the Rock and Roll album."

But let me get back to my basic argument. I am getting carried away on some of this.

THE COURT: I suppose at least as serious an issue, and maybe even more serious an issue is the issue between the two sides as to whether Capitol's claims in hastening the production, lowering the price, in other words, their own acts, are the responsibility of Mr. Levy. And that is a serious issue.

MR. SCHURTMAN: I will get into that, but let me address myself first on the issue of price-cutting. Let me tell you my vies on it.

Capitol has claimed all along, and Mr. Prettyman said it again a few moments ago, that they cut their price -- and I am only going to talk abut albums now -- from $6.98 to $5.98.

mdh 1

T4 Now, your Honor, you heard days of testimony by Mr. Zimmerman and by Mr. Posner, and I put in exhibits to show that the 6.98 is an artificially created price. No record is ever sold by that price.

Mr. Posner testified, and I would like to give you the reference to that because it is absolutely critical to our case -- it is at page 10 of my brief, transcript 2702.

Now, we put in evidence to show that when Capitol's albums first come out at a 6.98 price they sell for about 3.69 or 3.88.

You saw the one on Walls and Bridges, on Mind Games, Paul McCartney's recent album. That is the price at which they are sold in the retail stores, 3.69 to 3.88.

Mr. Posner said that's only at Korvettes and Goody's, in other parts of the country they sell for more. I said what's the highest price they sell for, and his testimony was $4.79.

Your Honor, the proper comparison in this case is not 6.98 versus 4.98 charged to Roots, and it is not 5.98 versus 6.98, it is 4.79 versus 5.98. That's the real world we are talking about, not some fictitious suggested retail price.

THE COURT: Let me get this. The different prices

mdh 2

that are relevant it would seem to me are obviously the suggested retail price. Just saying it is not conclusive but it is relevant. I want to line the prices up and get them in my mind.

The suggested retail price 6.98 or 5.98. Another relevant price, it seems to me, would be --

MR. SCHURTMAN: The wholesale price.

THE COURT: Yes.

MR. SCHURTMAN: You have it on page 10 of my brief. The wholesale price in 6.98 is 3.36, the wholesale price in 5.98 is 2.90.

THE COURT: These aren't the average.

MR. SCHURTMAN: No. The average vary because you include tapes, according to Zimmerman's testimony, but the principle is the same.

THE COURT: Wait a minute. Is the 2.90 accurate? It doesn't make a lot of difference, but I had 2.85. Where did you get the 2.90?

MR. SCHURTMAN: 2.90 was something Mr. Zimmerman testified to, and he and Mr. Posner gave slightly different testimony on that point. So it depends on whose testimony you pick up.

The principle, your Honor, I think is the same, whether it is 2.90 or 2.85.

mdh 3

THE COURT: That isn't a big difference. I think that the accurate price is 2.85.

MR. SCHURTMAN: I will accept that for purposes of this argument.

THE COURT: Can somebody check that, please, so we get the wholesale price on the album. At 6.98 it would be I think he said 3.32.

Another relevant price would be the average prices actually charged at retail after discounts and that's what you are talking about.

MR. SCHURTMAN: Yes, what the customer -- and we have used the word consumer in this case-- what the consumer in the street pays for the album. The same consumer who would either buy the Roots album or the Capitol album.

THE COURT: The range of discounts, I think you are right.

MR. SCHURTMAN: The high point in that range is 4.79, your Honor.

THE COURT: And then you say that the record indicates that the discounted retail price would go down to about 3.50 in the case of the 5.97 album, right?

MR. SCHURTMAN: Right.

THE COURT: I would appreciate if somebody could

mdh4

check out those figures, because that's a pretty good table I can use.

MR. SCHURTMAN: The question that I put to your Honor, and the question that I put to the various witnesses, was this. If Roots was selling at 4.98, and this is a price that cannot be discounted, your Honor, because it a mail order package -- remember, the advertisement, you saw it, the commercial, said send in your 4.98 plus postage, plus handling, in the case of COD's.

Now, that can never be cut. That is 4.98.

THE COURT: How did they know?

MR. SCHURTMAN: How did who know?

THE COURT: You see, Mr. Schurtman, I have to tell you, I don't think we can look at this from the standpoint of an omniscient being or even a less than omniescient being at the time of the trial of the action. The question, it seems to me, is the conduct of Capitol at the time.

There were lots of things they could have done. I talked earlier in this proceeding about them bringing suit. Another person might say they should have sued for a TRO or preliminary injunction. Another person might have said, well, the best thing was what they did. As far as pricing one person might second guess and say they

mdh5

should have reduced it, and another person might have said something different.

But, you see, it does seem to me that -- let's suppose this. Let's suppose Capitol had sat there and said -- we won't reduce the price, and we will stick to our schedule and we will wait with all due deliberation and put it out in March or April.

Now, let us suppose that they come out in March and April and sell 342,000 or 270,000 or whatever. They sue.

The argument then would be that they failed to mitigate damages. They took their sweet time and they should have acted more quickly. So it seems to me that there has to be -- basically, no matter how you sliceit, I am in the position of judging to some extent the reasonableness of their conduct, and you don't do that by hindsight, and you don't do that by everything you know later.

MR. SCHURTMAN: Your Honor, I am not talking about whether they should have waited longer or done it immediately. That's a question of mitigation of damages.

THE COURT: These were judgments, how to price it.

MR. SCHURTMAN: I haven't reached that point yet. Let's talk about price only, and I want to focus on the price.

THE COURT: Okay.

mdh6

MR. SCHURTMAN: Capitol knew, even though Mr. Zimmerman tried to deny it under oath, they knew as far back as February 1st, because we have an admission to that fact in the record, that the Roots price would be 4.98.

You asked the Capitol executives -- and this is not hindsight, just a plain application of reason -- they asked themselves, now to compete against a 4.98 album can we do it with our so-called quote 6.98 unquote record?

Now, these executives knew that the 6.98 is an artificial, fictitious price. Nobody pays 6.98. So they have to look at what their consumers would pay in the field.

THE COURT: What did they know about the 4.98 price? Did they know that it will never be discounted? Did they know that it will never be offered in retail centers? Had Mr. Levy come and said "Gentlemen, here is my price, and here it will be at stabilized levels".

MR. SCHURTMAN: There are statements in the record, such as undisputed facts, paragraph 116. It is quoted on page 9 of my brief at the bottom. It states "On February 1st, Tillinghast, the Capitol attorney, informed Wood, the head of EMI, by telephone that levy was planning to advertise the Roots album on television at 4.98."

That is admission number 1.

Admission number 2: "Mr. Menon testified" --

mdh 7

and that's at transcript 2383, it is quote earlier on page 9 "That he had reason to believe that Roots would be advertised on television at the price of 4.98, and he decided to cut Capitol's price in order to meet the 4.98 price."

Finally, Mr. Zimmerman testified that as soon as the first TV commercial appeared, and it appeared on February 8th, five days before the Capitol album was released, he saw that the advertised price was 4.98.

There is no question Capitol knew what it had to compete against was a 4.98 televised price.

THE COURT: You injected the word 4.98 mail order price. If I recall correctly you asked the Capitol witnesses if they didn't know that that is a non-discountable price, and I think they told you that at the time they set their price they did not know such a thing.

MR. SCHURTMAN: No, your Honor. Mr. Zimmerman admitted -- this is one of the few things on which I think he was candid -- that a mail order price was not subject to discounts, and everyone in the industry knows that because there is no way you can discount a mail order price. You advertise it on television. The customer sends in his 4.98 check. What are you going to do, mail him back a discount check? It doesn't make any sense,your Honor.

mdh 8

Again, your Honor, I ask you to apply the test laid down by the United States Supreme Court: Was what Capitol did, namely, that price reduction, a direct, immediate and necessary consequence of what we did?

Now, I suggest to you that when Capitol knew that the retail price would be 4.98 on Roots, and when they knew that the maximum retail price on a Capitol album would be 4.79, which is less than 4.98, you don't have to cut the price to compete against Roots. It was a totally unnecessary act.

Maybe they did the -- obviously they did the -- and they come in with all sorts of statistics to show they have never done it before, but that does not make it a necessary consequence of the 4.98 Roots price, your Honor, and that is where the causal connection is simply missing.

They did it, but they didn't have to do it. There was nothing we did that compelled them to do it.

I can speculate as to why they did it, your Honor, and I think I have a pretty good notion of why. I don't know if you want to hear my speculation on that.

THE COURT: I have got Zimmerman's cross that you conducted. He did say -- and I think I would like to have comments from the defendants on this-- he said that the decision on the 5.98 price was made before they knew

mdh 9

Levy's price. That's at the beginning of the session on the 30th of March.

He also said that they didn't learn of the 4.98 price until immediately after the first TV commercial.

He said that the reason for the 5.98 price was that historically TV packages were between 3.88 and 4.98.

Now, what Mr. Schurtman is saying here is that that is not true, that the admissions of Capitol are that Capitol in the forming of Tillinghast and Menon knew of the 4.98 price as of the 1st of February, which was before the 5.98 price was arrived at, so that's untrue what Zimmerman said.

Now, I think the question Mr. Schurtman is raising really is to the necessity.

One other thing to throw in the hopper is that Zimmerman testified that he knew that there could be no discount on mail orders but he thought Roots would be retailed as well as sold at mail order. But I think you have got to deal with some of those differences in testimony between your people.

MR. PRETTYMAN: Do you want me to do it now or later?

THE COURT: I don't care.

MR. SCHURTMAN: Do it now. I will meet the issue

mdh 10

right now.

MR. PRETTYMAN: Your Honor, I think the testimony read as a whole will show that there was no specific knowledge about television.

THE COURT: What do you mean specific?

MR. PRETTYMAN: That it would actually and definitely compute at 4.98. I think that what Mr. Menon was talking about was that he, like Mr. Zimmerman, knew that these things normally came out between 3.98 and 4.98, but since they had gotten hold of a Lennon package I think they were assuming it would certainly come out at 4.98.

The point I want to make is it doesn't make any difference whether they knew it or not, and there is a simple reason for it. Number 1, they are not going to lower their price if they don't have to. They would much rather, obviously, have a 6.98 price, so they had to do it for some reason.

Number 2, I just want to show you Exhibits CI-1, CI-2, CI-3 and CI-4.

In each case the price is 3.98.

MR. SCHURTMAN: When did these albums come out? There was an industrywide price increase in 1974, sir.

MR. PRETTYMAN: That has nothing to do with the point I am making. The point I am making is this

immutable price ended up in somebody's store instead of 3.98 at 1.99, and we had knowledge Adam VIII was the kind of company which traditionally put things out on television and then ended up in retail fulfillment centers and then dumping into stores, and we had knowledge there was going to be a range of discount on our own albums, so, obviously, with the uncertainty of the range of discount on our own albums and our knowledge of what traditionally happened on albums it is ridiculous to say that our reducing of our album had nothing to do with theirs. We don't reduce albums in price unless we are forced to as shown by the fact that twice in five years we did it.

MR. SCHURTMAN: I will cover that point in a moment.

THE COURT: These exhibits do show Jimmy's Music World at 1.99.

MR. SCHURTMAN: Mr. Prettyman has just testified with respect to matters which are not in the record before you, your Honor. Mr. Prettyman --

THE COURT: These are exhibits.

MR. SCHURTMAN: Yes,and I will tell you what Jimmy's Music World -- and I know one place in Penn Station because I buy records for my kids there, is what is known as a shlock house. Once a record has run its course as a regular album it winds up in the discount houses

you can pick it up for $1, $1.99; it is a junk store, with you that happens a year or two or three after the record has come out. The same thing happens to Capitol Records, your Honor. I can buy you a Capitol Record for $1 some place. That doesn't prove anything, because there is no evidence before you as to when these records wound up at Jimmy's discount store.

We are now talking about a new album and about the period of, say, one year following its release, or even the first 90 days, because Mr. Menon said that was the critical period.

When an album is first released, your Honor, if it is a regular retail album--

THE COURT: Isn't there a psychological thing? Is this pricing psychology to some extent.

MR. SCHURTMAN: Pricing is competition, your Honor.

THE COURT: Right. But competition and pricing is psychological. What will people know about, what will they think about? I can't see that the suggested retail price is irrelevant. If it was they wouldn't even bother naming it.

MR. SCHURTMAN: I will tell you what the purpose of the suggested retail price is. It has three

purposes. One of the witnesses told you two -- in fact, one of the witnesses told you all three purposes.

Purpose number 1 it is the price on which artists' royalties are computed. It is traditional. You say 10 percent or 12 percent of the suggested retail price. That doesn't make the retail price meaningful to the consumer.

Reason number 2 for the suggested retail price is that it is the basis for computing wholesale discounts. Again, it is just a starting point for computations.

Reason number 3 is that thre does come a point in time, and it is usually about a year and a half after an album has been released, when a record is no longer a hot item. If it is a good record it becomes a so-called catalog record, a catalog item, which music stores, good music stores, carry in inventory.

THE COURT: I thought the record was that the catalog thing started much earlier. They were classified--

MR. SCHURTMAN: Not much earlier.

THE COURT: The witnesses here talked about a 90-day period as being the immediate, and then it becomes a catalog.

MR. SCHURTMAN: A record does not become a catalog item after 90 days, except in unusual circumstances, your Honor. Because what a catalog item is is when a

music store sticks it into its inventory and keeps two or three of these items on hand so that if a customer who wasn't in on the original sales decides a year from now, two years from now, gee, I would like to hear Rock and Roll, and wanders into a music store they will probably have two or three copies on hand.

For that they charge-- even then they normally don't charge the full 6.98 but they may charge close to it. But that's not what we are talking about. You had a witness testify--

THE COURT: You have got a question of necessity. There is no question that -- I don't think there can be much question that the reduction was the result of the competing album there.

MR. SCHURTMAN: I think there is a very serious question, your Hor

THE COURT: The question you raise is whether it was necessary, sensible and reasonable.

MR. SCHURTMAN: Let me read you Mr. Menon's deposition testimony. I know you heard it once, but it will have more impact to show you the change between the man's deposition and his trial. It is quoted in full on page 8 of my brief.

Shall I read it or would your Honor want to?

THE COURT: I have read it.

MR. SCHURTMAN: Mr. Menon gave three reasons in his deposition taken May 8, 1975. Reason number 1 was the condition of the marketplace.

Reason number 2 was the fact that he was concerned that this was not an album of original Lennon compositions, but an oldies album and he didn't know what impact it would have on the marketplace.

Reason number 3 was that he knew that Roots was coming out.

THE COURT: I am afraid I have to say to you that I don't think Mr. Menon knew what he was talking about part of the time, and I think that --you know, I've got a job of evaluating credibility and I am afraid I have got a job of evaluating between Capitol witnesses. The people that knew it --

MR. SCHURTMAN: Then look at page 9 of my brief, your Honor. Two people did know it. Mr. Tillinghast knew it on February 1st that it would be 4.98. Mr. Zimmerman knew it on February 8th, that it would be 4.98.

The question I have asked you is if they knew that their own album would sell in the range between 3.66 and 4.79, why do you have to cut the price any further in order to compete against a 4.98 album? That is the

question. They did it. Obviously they did it. They may have good reasons for doing it. But it was not the necessary result of what we did.

THE COURT: I think the word necessary is what I have to weigh. I will take a short break.

(Recess)

MR. SCHURTMAN: Your Honor, I again emphasis that Mr. Menon testified that he knew the 4.98 price--

THE COURT: I get your point on this necessity. You can go on.

MR. SCHURTMAN: Let me make one point.

Mr. Prettyman has stressed over and over that Capitol did reduce the price to whatever they reduced it to, and I am talking about wholesale prices and not suggested retail prices, and that why would they do such a silly thing unless we forced them to do it.

Well, there are two answers to it. Number 1, people do silly things and you don't blame other people for it, and the Second Circuit has made that very point in the recent case of Perlstein v. Skudder and German, and it is on page 39 of our brief.

In discussing the rule of mitigation of damages-- that was the precise issue there -- that was a Regulation T case, your Honor, where somebody sued a broker for violating

Regulation T, the court said "It is equally unfair to charge the tort feasor with consequences of what developed to be poor judgment on the part of the party claiming damages."

I think what happened here, your Honor, and there is enough in the record to warrant a finding to that effect, I am not making it up, is that when this situation with Levy arose Capitol decided that they were out to get Levy and teach him a lesson. They decided not to go for an injunction because they didn't think they had a strong enough case for an injunction, they so testified. They decided to kill Levy in two ways: by sending the telegrams and trying to get him off the air and cutting off his suppliers, and by killing him in the marketplace.

This was an economic decision. It was not a necessary consequence of what Levy did. They regarded him as a pirate and they were out to get him by whatever means they could including by what I could only refer to as predatory pricing, cutting the price below the normal wholesale and retail prices. They figured if the price is cut low enough they will demolish Levy and teach everyone else a lesson.

THE COURT: What is predatory about a price $1 above his price?

MR. SCHURTMAN: It isn't, your Honor.

THE COURT: There isn't anything in the record about such a motivation. That's really fantastic.

MR. SCHURTMAN: Your Honor, please, I am at my wits end, I must confess, when your Honor refers to the 5.98 price as a real price in the real world.

THE COURT: I have in my mind -- I am using the number because you have used it. I know about the discounts and the wholesale price. Please don't go back on that.

MR. SCHURTMAN: They cut their price from 3.36 to 2.85

THE COURT: I know that.

MR. SCHURTMAN: And the result of that price cut would have been a slight increase in the retail price from a normal -- a slight decrease issued say from the normal range of 3.69 to 4.79, which is what Mr. Zimmerman said was the 6.98 range to a range--

THE COURT: You don't have to go back over that. This thing about motivation to kill Levy--

MR. SCHURTMAN: Your Honor, I will take back the kill Levy part. At that point, as I said, I am drawing certain inferences from the record. Because the question occurs to one: why did Capitol cut that price if they didn't have to cut it in order to compete against the 4.98 price?

THE COURT: Stick to the evidence. I think we can go on to the next point. I get the point about the necessity and the claim of poor judgment. Let's move on to something else.

MR. SCHURTMAN: The next point is the question of lost sales.

Defendants have advanced two theories on lost sales. One, that the release and promotion of Roots caused customer and consumer confusion.

Theory number 2, that the release and promotion of Roots caused capital to rush out its own album without adequate preparation and promotion.

Now, let's talk about consumer confusion first. You heard some very general testimony by Mr. Zimmerman, by Mr. Marsh that people were confused. You didn't hear about a single confused customer. Not one customer came in to say that he was confused. You didn't hear about a single consumer who was confused. The defendants did not offer any surveys or polls, which are the traditional ways of proving consumer confusion.

I think the reason they didn't do it was because there was no way of proving confusion. The 1,270 albums of Roots that were sold, maybe they confused 1,270 people, and I will come to that in a moment because they

didn't even prove that.

The television commercials resulted in 1,270 sales. I suggest to your Honor you cannot draw an inference of either consumer or customer confusion from that type of evidence. It is not proof. It is speculation. They simply didn't prove a confusion case. They didn't meet any of the legal tests laid down by the courts, and we have covered them in our brief regarding proof of confusion. They have alleged it. They have said it over and over again, but they haven't offered any evidence of confusion, and that's what really counts in a case of this type.

Let's talk about the timing of this album. You may recall that when Mr. Prettyman examined his own witness, Mr. Menon, he said "Mr. Menon, when is the most immediate impact of sales? When is it important to get your promotion in, your postage, your T-shirts, and the whole bit?"

And Mr. Menon testified "The initial impact -- the greatest impact is immediate, immediately."

You may recall that testimony, your Honor.

THE COURT: Yes, and a lot of discussion at the time.

MR. SCHURTMAN: Immedidate sales.

So we go into the question of immediate sales. Mr. Zimmerman was testifying, and I said "Okay, now what

impact" --

THE COURT: This is one point we argued almost indefinitely at the time.

MR. SCHURTMAN: No, your Honor, you didn't let me argue at the time.

THE COURT: I did. Your argumets were the immediate sales were high and they fell off so the publicity which was intended to have the impact on immediate sales was very good and therefore there was no lack of impact from lack of publicity, but the point is that those figures that we talked about endlessly were the figures of Capitol to its customers and they were not the consumer sales, and it was the testimony repeated again and again that the consumer sales, if they are not good at first, can cause the withdrawal and lowering of later orders by the wholesalers, and that is what happened.

MR. SCHURTMAN: Then let me move on from that point, your Honor.

Mr. Zimmerman at first testified-- let's go back to Zimmerman's testimony. First he testified that customer sales were hurt, customers being the retailers, distributors, and so forth.

We then subpoenaed the figures of Capitol. We simply asked them for their sales figures. We didn't

specify consumer or customer. We got their sales figures and we put them in, and your Honor looked at the comparison charts of the different albums.

Mr. Zimmerman looked at it, and I showed him that the figures showed that during the first few weeks Rock and Roll did extremely well. So then he suddenly shifted his ground. He said "Those aren't consumer figures, those are customer figures and they don't mean anything."

I said "Fine, if they don't mean anything then your customers weren't confused, so let's now talk about the consumers. Now what evidence do you have that consumers were confused."

At which point Mr. Zimmerman said "We don't have figures on consumer sales. Capitol is unable"-- and I simply cannot believe that --"are unable to tell us what the consumers bought."

That is his testimony. If their case is based on a loss of consumer sales they haven't prove any damage on consumer sales during the critical period.

THE COURT: Mr. Schurtman, we went over this I can't tell you how many times.

MR. SCHURTMAN: Let me talk some more about consumer sales. Several witnesses testified that

the way you measure a general sales impact of an album is through the charts. That is the magic word in the industry, your Honor, the charts. Every record lawyer, every record executive, always want to know how is an album doing on the charts.

So we brought in the Billboard charts, and we showed that this album during the early weeks, right after its release, when there was supposedly no promotion and no TV and no advertising, and when Roots was still confusing everyone, during the early weeks this album hit number 6 on the charts. It was among the top six records in the country.

So now suddenly we started having people backing off from the charts. Mr. Zimmerman said "Well, the charts don't really mean anything, they don't show consumer sales, even though on their face they say they do."

I get Mr. Lennon on the stand. Mr. Lennon kept challenging me. He said, okay, you have brought in Billboard. What about Cashbox and Record World. So I went out and got them, and lo and behold they showed the record was not number 6 on the charts, it was number 4 on the charts. All three charts which are made up by independent survey organizations, which are not connected with each other, showed that this record was doing fantastically well during

the period of initial impact, during the first few months.

THE COURT: Is it your contention that the charts showed Capitol sales or consumer sales?

MR. SCHURTMAN: I say the charts showed consumer sales, and what Mr. Marsh, the expert witness, testified, your Honor, I haven't got his transcript yet, but I am sure you will recall it, it was yesterday, he testified the charts showed two things: consumer sales and air play, and, radio air play, and he also testified that air play is the most important factor in this business. That if a record gets a great deal of air play, and the charts show that it did, then it is going to be successful.

The point I am trying to make to your Honor is that this so-called rush, if it took place at all -- and I am going to come to that point in a moment, because Mr. Menon testified it did not -- but if that rush did take place it did not hurt the Capitol sales during the initial period of impact, during the first 90 days it did not hurt them either on the customer level as shown by the exhibits, the schedules that Capitol gave us, or on the consumer level as shown by the three separate charts.

T5 mms

It shows that this album did beautifully. Now, what caused it to fall off later, because at some point it did go off the charts. Well, there are several reasons, your Honor:

Reason No. 1, the witness testified that this was a period of economic recession; sales were falling off. Mr. Zimmermann testified that sales during that period fell off 25 per cent because the kids were unemployed and could not afford to buy albums.

Mr. Posner corrected Mr. Zimmermann's figure. He said, "Oh, no, 25 per cent is too high; they fell 14 per cent."

Well, in my brief, your Honor, and also in the exhibits we submitted we have given you a number of averages and we show that the most realistic average, which was the one between Mind Games and Walls and Bridges, if you take that average, Rock and Roll did 14 per cent less than that average, and that 14 per cent by coincidence happens to be the 14 per cent that Mr. Posner mentioned as being the result of the economic recession. That is the thing that had an impact on the album.

You have had several witnesses testify that Rock and Roll was not a characteristic Lennon album. You heard the album yourself. You yourself said on the

ms2

record there is a difference between something like Walls and Bridges and something like Rock and Roll. And I tried to make the point during the trial, and I will make it as an argument now, that Lennon fans -- and we don't know exactly who they are -- they make like Lennon's own compositions, they may love them -- I love some of Lennon's music myself -- but that does not mean they want to hear Lennon singing all rock and roll songs that somebody else composed. He is not the greatest performer in that field. That may have affected sales.

You heard a number of witnesses testify the way kids normally go about buying is through word of mouth advertising. They tell each other what is good and what is bad.

Now, the record first got to No. 4 and No. 6 on the chats. It was doing extremely well. At that point the kids must have started talking to each other, and they could not listen to the album in the record stores, they had to buy it first to listen to it, and they started telling each other, "Wait a minute. is this a typical Lennon composition? This is not Walls and Bridges; this is not Mind Games; this is not imagine; this is a bunch of old rock and roll songs."

Let us take the key witness on this point,

ms3

Mr. Lennon himself. You may recll that Mr. Lennon testified in his deposition and during the first trial that the reasons he had almost decided to abandon the Rock and Roll album when he met Levy in October of 1974 were, one, he was afraid the nostalgic craze for rock and roll had passed, that the album had simply been delayed too long, and, second, he was terrified of the critics.

You have heard other witnesses say that the critics don't say anything. You heard Mr. Marsh testify on direct that the reason you have critical reviews in Rolling Stone Magazine is that it acts as a consumer guide. And yet when I cross-examined him, he says, "Well, people don't really pay any attention to negative reviews." and yet at the same time you have got from Mr. Lennon, a great artist, expressing the fear over and over and over again, "I don't want to put this album out on regular retail channels because the critics are going to murder me.

THE COURT: Mr. Schurtman, this certainly is so familiar to me, what you are saying. Let us use a little judgment and try to point up some things that can add something. We have really canvassed this case. I have heard this.

MR. SCHURTMAN: I know it is familiar to you.

ms4

This is summation, your Honor. I am supposed to pull things together.

THE COURT: There is a limit to the length of a summation, and you are not to expand on every single point. Just go on.

MR. SCHURTMAN: Let me move on.

THE COURT: It will help me to hear a summary briefly of your points, because I want to have them in mind.

MR. SCHURTMAN: Your Honor, the next point is this:

You asked a very pertinent question of Mr. Zimmermann. You said, and I quote from the transcript at 2899 -- it is on page 22 of my brief, you said:

"What are good sales? Does that word have any meaning? Is 300,000 good? 400,000?"

Mr. Zimmermann replied not to that specific question He gave testimony at one point which I think in part answered your Honor's question. He said that Mind Games, which sold 376,000 units did respectably well. If you want to go above 376,000 in this case, your Honor, and you have indicated that that is the range you are thinking, then I think you must find that this album, the Rock and Roll album, should have done more

than respectably well, that it should have done extremely or exceptionally well. And I submit, your Honor, that all the evidence in the record points in the other direction. It was not -- I know I am repeating myself --

THE COURT: Yes, you are, really. You have no idea how much I have thought about this. I think the other lawyers have gone through this rather quickly, and that is about all we can do. We have been on this case for days and days and days.

MR. SCHURTMAN: I must confess I was very distressed when you mentioned at the outset of the arguments that you intended to dictate a decision off the bench, which, at least, was an indication that you were prepared to award several hundreds of thousands of dollars without going through the detailed transcript in the case. I realize that your Honor takes detailed notes. On the other hand, I am obviously not privy to your notes, and I submit that a case with the types of issues that you have here -- and I am talking about the damages now, not the liability --

THE COURT: I will tend to my business and you tend to yours. A jury does not even have notes and they deal with more complicated things than this. The best time for me to make a decision is when I am prepared to do

ms6

so, and that is now, considering everything that I hear. But I am taking very seriously what you say. I also have to tell you I heard this, these diferent considerations on both sides a great deal.

MR. SCHURTMAN: I don't know what points will influence you. I will run down the contents of my brief, which hit each point, and if there is anything that you want me to, I will focus on it.

I have pointed out in the first place there was no rush at all. That is on page 15 of my brief. And I will rely on the testimony that Mr. Menon gave back in May of 1975 in his deposition, when he admitted, he said, "I cannot recall that we expedited it, the Capitol album, to any unusual degree. There is nothing clear in my mind about that having been the dominant factor." and yet by the time of the trial eight months later you get Mr. Menon testifying, "Oh, I made the decision to rush the album. We had to do it in order to meet the Levy album."

Please, your Honor, focus on the difference in testimony. I think it is important. We know that the alleged rush did not hurt the quality of the album, because Mr. Lennon started making the final editing before the decision to rush was made. That was February 7.

ms7

Now, what about the promotion plans? Let me focus on that for a moment. Mr. Zimmermann testified -- this is on page 17 of my brief -- that after Lennon approved the promotion plans on January 23 there were no changes and nothing was left out. That was his testimony. He then went on to tell you that back in October of 1974 they had planned upon having a huge TV campaign in which they would spend between 150,000 and $250,000, and that they could not run this campaign because of the intervening Roots.

Now, if somebody plans a 200,000 to 250,000-dollar campaign, one would assume that an organization, such as Capitol, would have at least one scrap of paper referring to it, one memorandum, one letter, something. There was absolutely nothing. Mr. Zimmermann could not even recall with whom he discussed this great projected TV campaign. he simply told you, "Yes, we planned it, we didn't have it, and therefore we were hurt."

The TV campaign becomes significant on another aspect of the case, your Honor, and that is the computation of profits. Because what the defendants have done, leaving aside for the moment the overhead figure -- I will come to that -- but what they have done, they have asked you to find that there would have been additional sales

had they been able to conduct a TV campaign that they had planned, but they have not deducted the costs of the additional TV program.

Further on in my brief --

THE COURT: You discuss that at the end of your brief?

MR. SCHURTMAN: I discuss it at page 51.

THE COURT: I want an answer to that, Mr. Prettyman.

Do you have the figures On that?

MR. SCHURTMAN: Yes, on page 51, your Honor, and it shows that based on their computation they would have spent an extra 61 cents on TV to sell each album that they claim they lost.

Now, they can't have it both ways; they can't on the one hand say, "Your Honor, they kept us from putting this on TV and, therefore, we lost sales."

THE COURT: How do you get the 61 cents?

MR. SCHURTMAN: They testified they would have spent $250,000 in order to get 750,000 units. They actually spent $5000 in TV, according to their own exhibit. So they saved themselves $245,000 of TV expenditures. The difference between 342,000 and 750,000 is 408,000 units. In order to get 408,000

ms9

additional units sold by their own computation -- I didn't make those up -- they would have had to spend an additional $245,000. I divide $245,000 into 408,000 additional units, and I get additional TV expenditures of 61 cents per unit.

THE COURT: What about that, Mr. Prettyman?

MR. PRETTYMAN: I certainly can't answer it, for I just got this. I never read this before.

THE COURT: It does seem to me that for any claim of additional unit sales based upon additional TV advertising, you would have to reduce the profit of the assumed additional sales by the assume TV advertising.

MR. PRETTYMAN: He is assuming that entire amount, that the entire difference is accounted for by our failure to advertise on TV. It may be that a very small amount would be accounted for by failure to advertise on TV. You can't spread it over the entire amount that is missing.

MR. SCHURTMAN: Your Honor, they mentioned only two major factors; TV and the promotional material, the T-Shirts, buttons and so on.

Their expert witness, Mr. Marsh testified that the T-Shirts, the buttons and so on don't mean a thing in terms of consumer sales. You asked him.

ms10

MR. PRETTYMAN: That is not his testimony.

MR. SCHURTMAN: I suggest you look at his testimony, because the Court asked Mr. Marsh several times, "Mr. Marsh, what impact on sales would the delay in T-shirts and buttons have?"

And Mr. Marsh kept going around in circles , you kept trying to pin him down, and he finally, in effect, admitted he could not tell. So we are really talking about TV.

THE COURT: The TV thing is a very substantial item. So let us go on and come back to that.

MR. PRETTYMAN: I thought it was $150,000 to $250,000.

Where do you get the $250,000 figure?

THE COURT: He cited the transcript.

MR. SCHURTMAN: I am predicating it on that 750,000 projection. I am giving them the benefit of that. If I predicate it on a lower projection, the amount would be higher.

THE COURT: I think there is a point here. We are obviously involved in estimates about things that didn't happen that way. That is what we have got to deal with. So we got to be realistic. They are going to think abut that. I will, too.

msll

What other things? You made an argument several times at the trial that you could not consider that he was damaged because he already had the nude album and so forth.

MR. SCHURTMAN: I am really getting ahead of myself. If you want to hear me on that, that has to do with the injury to Mr. Lennon's reputation. The reason we put in the nude album, the album where he had a cover of himself being arrested, the reason we did that is not because we were emphasizing Mr. Lennon's nudity or his arrest. He can put out anything he wants. It is certainly all right with me. What we were emphasizng was that Mr. Lennon himself is not terribly concerned about his impact on the public. And I think he made it rather clear. The reason is that he has become a type of super star, a type of super being -- and I called him that in my brief -- his reputation at this point is almost impervious to injury.

Now, that does not mean that people can go around and use his name and face and music without his consent. Obviously, I concede that. And if this was simply an injunction case, there is no question that once he proves that we were not authorized to use his name you should enjoin us, if it were an injunction case,

ms12

and assuming all the other requisites of an injunction matter. But here you are being asked to award damages for injury to public reputation, and you must ask yourself what is the man's public reputation and has he really been injured? Has the fact that 1270 Roots albums were sold and that these commercials were on the air, has that really injured his reputation in a compensable amount.

I submit, your Honor, it has not.

MR. PRETTYMAN: May I ask a question?

You say here we planned to spend $150,000 and then you say we planned to spend an additional 100,000 if the TV campaign proved successful.

If you turn to page 2809 he says:

"We used the 50 to 75 in each major market and spent $150,000, and the promotion was so successful we enlarged upon it and continued our television exposure and spent about another $100,000."

msl3

MR. SCHURTMAN: At another point he testified that he was using the Beach Boys album as a guide for Rock and Roll. He said at another point, "We were going to do the same thing we did with Beach Boys."

MR. PRETTYMAN: He said they were going to repeat the initial stages of Beach Boys, which was $150,000. He never said they were going to put in an additional hundred thousand. I think it is a clear distortion of the record.

THE COURT: What did Beach Boys sell?

MR. PRETTYMAN: It was several million.

THE COURT: Records?

MR. PRETTYMAN: Yes.

MR. SCHURTMAN: Let me read it in context, page 2772 he said:

"Well, we had planned and I think it came up in testimony during the last meeting, we planned a relatively major television assault -- he was talking now about Rock and Roll -- and the expenditure on television would have probably approached $150,000 which would have encompassed about 50 to 75 spots in each of those major markets."

At that point I objected on the ground it was

hypothetical testimony.

You then asked the witness to explain what this based on. The witness said:

"50 to 75 depending on the size of the market and the cost of television in that particular market."

The Court then asked:

"What is the basis for your saying 50 to 75, is it customary or is it a plan?

"A It was a plan that was discussed.

"THE COURT: This time or what?

"THE WITNESS: During the fall of 1974. We had come off an extremely -- there must be a word missing -- successful television promotion in behalf of the Beach Boys which had worked out very successfully. This album appeared to be one that could be equally successful with the same marketing ingredients and advertising expenditures put on its behalf."

He then explained the Beach Boy campaign.

MR. PRETTYMAN: Read the next answer.

MR. SCHURTMAN: "THE COURT: Did it come to the point of actually discussing the extent in dollar terms or the extent in terms of number of spots? Did it come

to the point of actually discussing what you would do for the Rock and Roll album?

"THE WITNESS: It was discussed in terms of duplicating the initial stages of the Beach Boy campaign.

"THE COURT: Which would have involved what you are talking about?

"THE WITNESS: Yes, sir.

"THE COURT: Are you telling me that you only played, well, that would have been a total of how many TV spots?"

MR. PRETTYMAN: Now you can skip over to 2809.

MR. SCHURTMAN: Let us not skip over.

MR. PRETTYMAN: I just want to show that the statement in the brief is a distortion of the record.

THE COURT: Let me see the record.

MR. SCHURTMAN: It is not a distortion; it is based on the man's testimony.

THE COURT: 28 --

MR. PRETTYMAN: 2809.

MR. SCHURTMAN: You have to look at about 20 pages of testimony, the whole Beach Boy sequence, because he analogized.

mms

THE COURT: Look at what they say in the brief.

What are the inclusive pages that I am supposed to read?

MR. PRETTYMAN: 2773, 2775, and 2809, and then look at page 51 of his brief.

THE COURT: 2773 --

MR. SCHURTMAN: Through 2809. You will have to read the whole thing in context, otherwise it does not make any sense, and I listed both page numbers in page 51 of my brief.

THE COURT: Was there a reference at 2809, somebody said?

MR. PRETTYMAN: Yes, sir, he is talking about the Beach Boys album and he has converted that figure into the figure that he said we are going to spend. He said we were going to duplicate the initial stages, which was $150.

(Continued on next page.)

United States Court of Appeals
For the Second Circuit

Big Seven Music Corp. and Adam VIII, LTD.,
Plaintiffs-Appellants,

against

John Lennon, Apple Records, Inc., Harold Seider,
Capitol Records, Inc. and EMI Records Limited,
Defendants-Appellees,

and

Morris Levy,
Additional Defendant on Counterclaim-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place Bronx, N.Y. 10452
That on Nov. 19, 1976, he served

One Appendix Volume 1-6 and one Exhibit Volume and two Briefs on behalf of Plaintiffs-Appellants and Additional Defendant on Counterclaim-Appellant.

On:
Marshall Bratter Greene Allison & Tucker, Esqs.
430 Park Avenue
New York, N.Y. 10022

Cleary, Gottlieb, Steen & Hamilton, Esqs.
One State Street Plaza
New York, N.Y. 10004

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

. . . . . .

Sworn to before me this
19 day of November, 1976